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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1977

No. 77 - 849

NORTHERN CALIFORNIA MOTOR CAR DEALERS
ASSOCIATION and MOTOR CAR DEALERS
ASSOCIATION OF SOUTHERN CALIFORNIA,
Appellants,

vs.

ORRIN W. FOX, a corporation,
MULLER CHEVROLET, a corporation,
and GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court,
Central District of California

JURISDICTIONAL STATEMENT

JAMES R. McCALL,

Professor of Law, U. C. Hastings, Of Counsel,

CROW, LYTLE, GILWEE, DONOGHUE,

ADLER & WENINGER,

431 J Street,

Sacramento, California 95814,

Telephone: (916) 441-2980.

Attorneys for Appellants.



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JURISDICTIONAL STATEMENT

Appellants appeal from the summary judgment of a three judge court of the United States District Court, Central District of California entered on September 15, 1977. The judgment appealed from per-

manently enjoined the New Motor Vehicle Dealer Board of the State of California and other officials of the State of California from performing their duties as prescribed by certain provisions of the California Automobile Franchise Act (California Vehicle Code §§3060-3069), on the ground that the provisions of the Act violate the Due Process Clause of the Fourteenth Amendment. Appellants, who were made defendants in intervention in the action by uncontested order of the district court, submit this statement to show that this Court has jurisdiction of their appeal and that substantial questions are presented by it.¹

OPINION BELOW

Unofficial reports of the opinion of the court below have appeared at 834 Antitrust & Trade Regulation Report, page D-1 (October 13, 1977) and 46 United States Law Week 2188 (October 18, 1977).

JURISDICTION

This action was brought to enjoin the enforcement by California state officials of a California statute, the California Automobile Franchise Act (California Vehicle Code §§3060-3069), on the grounds that the statute is unconstitutional under the Due Process

¹Appellants are informed and believe that the New Motor Vehicle Board of the State of California and the Department of Motor Vehicles of the State of California are also filing Jurisdictional Statements in this litigation with this Court.

Clause of the Fourteenth Amendment and the Supremacy Clause. The action was filed on April 13, 1976, while §2281 of Title 28 of the United States Code was fully effective. Although §2281 was repealed by Public Law 94-381, subsection 7 of the repealing statute specifically stated that the repeal was not applicable to any action filed prior to August 12, 1976. Under the terms of §2281 this action was required to be heard and determined by a district court of three judges pursuant to 28 U.S.C. §2284. The action was so heard and the three judge court rendered an injunction restraining California state officials from executing their duties under the Act on the ground of the Act's unconstitutionality under the Due Process Clause. The right of appeal to this Court from such an injunction in a civil action required to be heard by a three judge district court is established by 28 U.S.C. §1253. Decisions which sustain the Court's jurisdiction in cases of this type include: *Hicks v. Miranda*, 422 U.S. 332, 342-343, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) and *United States v. Georgia Public Service Commission*, 371 U.S. 285, 287-288, 83 S.Ct. 397, 9 L.Ed.2d 317 (1963).

**STATUTES INVOLVED AND
DISTRICT COURT PROCEEDINGS**

The provisions of the California Automobile Franchise Act which were held unconstitutional by the court below are California Vehicle Code §§3060-3063 and 3066-3069. Those sections, together with California Vehicle Code §507 which defines a relevant term,

are reproduced as Appendix C to this Statement. A copy of the opinion of the court below (labelled "Memorandum Decision") and the Summary Judgment it rendered thereon are reproduced as Appendices A and B, respectively, to this Statement. A copy of the Notice of Appeal filed by these appellants in the court below, showing the filing date of October 14, 1977, is reproduced as Appendix D to this Statement.

QUESTIONS PRESENTED

1. Is the expectation of establishing or relocating a retail automobile franchise a liberty or property which is protected by the procedural guarantees of the Due Process Clause of the Fourteenth Amendment?

2. Assuming that the procedural guarantees of the Due Process Clause do protect the expectation of establishing or relocating a retail automobile franchise, do those procedural guarantees require the State of California to provide an evidentiary hearing to persons holding that expectation prior to issuing an order which may delay the establishment or relocation of the franchise for a period of up to ninety days pending the outcome of an evidentiary hearing on the issue of whether there is good cause for permanently prohibiting the establishment or relocation of the franchise?

STATEMENT OF THE CASE

The New Motor Vehicle Board of the State of California (hereafter "Board") was created by California statute in 1967 and given responsibility for the licensing of new automobile retail dealers in that state. The Board was also given, by statute, the power to review decisions of the Department of Motor Vehicles of the State of California (hereafter "Department") imposing discipline upon licensed dealers, and the power to investigate public complaints concerning any licensed dealer and to undertake to arbitrate any dealer-customer dispute or to recommend disciplinary action to the Department regarding the dealer involved.

In 1973, the duties and responsibilities of the Board were substantially broadened by the passage of the California Automobile Franchise Act (hereafter "Act"). The Board was now given the additional power to review disciplinary decisions of the Department regarding the California license of any automobile manufacturer, distributor, or manufacturer's representative, and to receive and arbitrate or recommend Department action on any public complaints concerning any automobile manufacturer, distributor or manufacturer's representative. (California Vehicle Code §3050)

The 1973 Act also established certain adjudicatory functions for the Board to perform as part of a rather detailed legislative scheme for regulating aspects of the relationship between automobile manufacturers and their California retail dealers. The Act

prohibits any automobile manufacturer (hereafter sometimes "franchisor") from terminating any franchise which it has with a California automobile dealer (hereafter "franchisee") without first giving advance notice to the franchisee and the Board, and the Act requires franchisors to provide reasonable compensation to any dealer-franchisee as reimbursement for automobile delivery and preparation expenses and manufacturer furnished warranty servicing expenses incurred by a franchisee in connection with selling and servicing the franchisor's automobiles. (California Vehicle Code §§3060, 3064 and 3065) If the affected franchisee protests the termination of its franchise to the Board there can be no termination unless the Board finds that good cause exists for the termination in an evidentiary hearing. (California Vehicle Code §§3060, 3061, 3066-3069) Similarly, upon protest by a franchisee, the Board is given the power and duty to determine whether a franchisor has paid reasonable compensation to reimburse the protesting franchisee for delivery and preparation expense or for expense of warranty servicing. (California Vehicle Code §§3064-3069)

An additional, but related, feature of the 1973 Act triggered the litigation at bar. Vehicle Code §3062 provides that an automobile manufacturer may not establish a new franchisee or relocate an old franchisee without first giving written notice of such intention to the Board and to each of its existing franchisees for the same "line-make" of automobile located with the "relevant market area". Such area

is defined in Vehicle Code §507 as “ . . . any area within a radius of 10 miles from the site of . . . [the] . . . potential new dealership.” If any of the existing franchisees within the market area protest to the Board within 15 days of receiving such notice, the Board must issue an order temporarily prohibiting the franchisor from establishing or relocating the proposed dealership until the Board has held a hearing to determine if there is good cause for refusing to permit the proposed dealership to be established. If the Board, at such hearing, determines that good cause exists for not permitting the proposed dealership, the franchisor may not do so. The protesting franchisee has the burden of proving that good cause exists for not permitting the franchise to be established at the Board’s hearing, which must be held within 60 days of the Board’s order temporarily prohibiting the franchisor from establishing or relocating the proposed franchise. (California Vehicle Code §3066) Within 30 days after the hearing (or the receipt of a proposed decision from a hearing officer if such an officer is designated by the Board to hold the hearing), the Board must render its decision, or else the establishment of the proposed franchise is deemed approved. (California Vehicle Code §3068) It is unlawful for a franchisor to establish or relocate a franchise in violation of an order of the Board. (California Vehicle Code §11713.2(1))

Appellees herein filed suit on April 13, 1976 in the United States District Court, Central District of California, seeking a three judge court determination

that the Act was unconstitutional and that its enforcement should be enjoined. Appellee Orrin W. Fox Co. (hereafter "Fox") claimed to have executed a franchise agreement in May, 1975, with appellee General Motors Corporation (hereafter "GM") under which Fox was to be a newly established Buick dealer in Pasadena, California. Appellee Muller Chevrolet (hereafter "Muller") claimed to have made arrangements for a transfer of his existing Chevrolet franchise from Glendale to La Canada, California in December, 1975. The proposed establishment of both the Fox and Muller franchises were protested by the existing Buick and Chevrolet dealers, respectively, in the two relevant market areas in timely fashion under Vehicle Code §3062. The Board responded with orders prohibiting the establishment of the proposed franchises until it could hold a hearing under Vehicle Code §3066. For various reasons neither protest proceeded to a Board hearing prior to the filing of the within action by the three appellees.

In their complaint initiating this litigation, the appellees claimed that the Act violated their procedural due process rights under the Due Process Clause of the Fourteenth Amendment and was also invalid under the Supremacy Clause because it was in inherent conflict with the federal antitrust laws. The three judge district court addressed only the first of appellees' arguments in granting a Summary Judgment holding the entire California Automobile Franchise Act unconstitutional on its face because it deprived the appellees of their due process protected

rights to hearings prior to the deprivation of their liberty and property interests in establishing new, or relocated, automobile dealerships.²

The Summary Judgment granted by the district court also stated an alternative ground for holding the Act unconstitutional on its face even though this alternative ground was unmentioned in its Memorandum of Decision. The alternative ground so stated is that the Act fails to provide for a prompt hearing on the merits following the initial temporary deprivation of appellees' liberty and property interest in establishing a new or relocated automobile dealership.

THE QUESTIONS ARE SUBSTANTIAL

THE APPELLEES CLEARLY ARE NOT ASSERTING INDIVIDUAL INTERESTS WHICH QUALIFY AS "LIBERTY OR PROPERTY" UNDER THE FOURTEENTH AMENDMENT, THUS THE PROCEDURAL GUARANTEES OF THAT AMENDMENT ARE NOT APPLICABLE.

Appellees Fox and Muller possess a desire to operate automobile dealerships, and appellee GM possesses a desire to franchise each of them to operate dealerships. Such business desires or future contractual expectations are clearly not within the limited

²While the district court ruled that the entire California Automobile Franchise Act (Vehicle Code §§3060-3069) was unconstitutional, it would appear that only Vehicle Code §§3062 and 3063 and the references to §3062 contained in Vehicle Code §3066 were involved in the litigation before the district court. Thus the other provisions of the Act would appear to have been gratuitously voided even though they do not involve the Constitutional infirmities which the district court found in §§3062 and 3063 and the references to §3062 in §3066.

class of interests which this Court has stated are included with the phrase "liberty or property" in the Due Process Clause in the Fourteenth Amendment. The district court avoided any discussion of, or the making of any finding on, this point in its Memorandum of Decision (hereafter "Decision"). However, such a determination must be made under the "familiar two step analysis" which must be undertaken when the claim of a violation of the procedural due process rights of a citizen is made: first, a determination of whether the asserted interest of the citizen is encompassed within the Fourteenth Amendment's protection of "life, liberty or property" and, second, if protected interests are implicated, what procedures constitute "due process of law". (*Ingraham v. Wright*, U.S., 97 S.Ct. 1401, 1413, L.Ed.2d (1977))

In a considerable number of decisions in recent years, all unmentioned in the district court's Decision, this Court has clearly established that a mere expectancy of continued employment or a future contractual benefit is not entitled to procedural due process protection because such an expectancy is neither a property interest or a liberty under the Amendment. Although appellees' asserted interest would appear to be more likely to be held to be "property" than a "liberty", the decisions of this Court clearly establish that they cannot be classified as the former. In *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1971) and *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1971) this Court

established that due process protected an interest in an intangible asset, such as a future contractual benefit or government benefit, as "property", only when a citizen's right to the benefit is established by a state's rules or by mutually explicit understandings with the state. (See 408 U.S. at 576-578 and 408 U.S. at 601-603.) Assuming there is no allegation of the state having bound itself contractually to provide the expected future benefit, the requisite establishment can be supplied only by the laws of the state involved. (*Bishop v. Wood*, 426 U.S. 341, 344-347, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976)) There is no claim or allegation by appellees that their asserted interests in expected future contractual benefits is based upon any law of the State of California or any mutually explicit agreement with the State of California. Thus their expectations are not "property" for procedural due process purposes.

It is also clear that none of the expectations entertained by the appellees could qualify as a procedural due process protected "liberty". The cases mentioned above, as well as *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 1165, L.Ed.2d (1976) make it plain that such liberties must be found either in the Bill of Rights, or have been recognized and protected by state law. No claim or assertion of such a source for the protection of appellees' expectations is made, and none can be.

In that the Decision contains any analysis of the question of whether the appellees' expectations con-

stitute either property or liberty under the Due Process Clause, it seems to implicitly adopt the position that the grievous losses which allegedly may be suffered by the appellees without an adjudication prior to a Board order delaying the establishment of a franchise require that due process procedural guarantees be afforded appellees. However, this Court has often stated that it is the nature of the interest asserted which must implicate the Due Process Clause, and not the harmful consequences or "grievous loss" allegedly occasioned by the failure to apply due process procedural guarantees. (*Smith v. Organization of Foster Families for Equality and Reform*, U.S., 97 S.Ct. 2094, 2108, L.Ed.2d (1977); *Meachum v. Fano*, 427 U.S. 215, 224, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976); *Board of Regents v. Roth*, *supra*, 408 U.S. at 570-571, 92 S.Ct. at 2705)

The substantiality of the questions presented by the district court's erroneous Decision can hardly be overemphasized. The Decision, unless reversed, will stand as a precedent for a complete departure from the analysis which this Court has so clearly mandated for the resolution of procedural due process issues. The Decision creates a new class of procedural due process protected interests—expected future contractual benefits. This new class of protected interests would expand the scope of application of the Fourteenth Amendment to an almost unimaginable degree. Lastly, the Decision involves a type of statute and a method of regulation which is quite common among

the states.³ Unless reversed immediately it will have an unsettling effect on legislation regulating automobile manufacturer-dealer relations in many jurisdictions.

THE PROCEDURE IN THE CALIFORNIA AUTOMOBILE FRANCHISE ACT SATISFIES THE REQUIREMENTS ESTABLISHED IN *MATHEWS v. ELDRIDGE*, EVEN IF THE INTERESTS ASSERTED BY THE APPELLEES WERE DESERVING OF PROCEDURAL DUE PROCESS PROTECTION.

The Decision does not mention the analysis established as mandatory by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 332-335, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1975), and restated and applied in *Dixon v. Love*, U.S., 97 S.Ct. 1723, L.Ed.2d (1977). Assuming that the expectations of the appellees were "property" or "liberty" interests entitled to procedural due process protection, an application of the three-part *Eldridge* analysis would demonstrate that the Act meets the procedural requirements of the Due Process Clause. First, the private interest affected by the Boards' temporary order is not vital and a temporary deprivation causes no grievous loss. Second, the existing procedure results in no

³The case of *General GMC Trucks, Inc. v. General Motors Corporation*, presently the subject of a petition for writ of certiorari to this Court from the Supreme Court of Georgia, involves a similar statute in that state. The petition for writ of certiorari in that litigation contains an Appendix "D" which lists the statutes of nineteen states (including California) which impose conditions upon the establishment of new or relocated franchises in the marketing areas of existing franchisees handling the same line-make of automobile.

risk of a permanent deprivation, since it is merely a postponement until a full evidentiary hearing and decision, which must be rendered within 90 days of the temporary order. Additional procedural safeguards would be meaningless because the only option would be to have a full hearing, requiring the time consuming assemblage of evidence relevant to the factors listed in Vehicle Code §3063. Any preliminary hearing would be a hurried and error prone affair and presents no viable option to the existing procedure. Third, any type of preliminary hearing, given the complexity of the factors listed in Vehicle Code §3063, would be fiscally and administratively burdensome to the Board.

Respectfully submitted,

JAMES R. McCALL,

Professor of Law, U. C. Hastings, Of Counsel,

CROW, LYTTLE, GILWEE, DONOGHUE,
ADLER & WENINGER,

Attorneys for Appellants.

December 8, 1977

(Appendices Follow)

Appendices



Appendix A

United States District Court
Central District of California

No. CV 76-1200-WPG

Orrin W. Fox Co., a corporation, Muller Chevrolet, a corporation, and General Motors Corporation,

Plaintiffs,

vs.

New Motor Vehicle Board of the State of California; Melicio H. Jacaban, Audrey B. Jones, John D. Barnes, John Onesian, Winfield J. Tuttle and John B. Vandenberg, as members of the New Motor Vehicle Board; Sam W. Jennings, as Executive Secretary of the New Motor Vehicle Board; Department of Motor Vehicles of the State of California; and Herman Sillas, as Director of the Department of Motor Vehicles,

Defendants, and

Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California,

Intervening Defendants.

MEMORANDUM OF DECISION

[Filed Sept. 14, 1977]

Before ELY, Circuit Judge, and
GRAY and TAKASUGI, District Judges
WILLIAM P. GRAY, District Judge.

Plaintiffs General Motors Corporation and two retail automobile dealers in Southern California seek of this three-judge court a declaratory summary judgment that the California Automobile Franchise Act is unconstitutional on its face and as administered, and they seek a consequent injunction. This court has jurisdiction under 28 U.S.C. §§ 1331(a), 1337, 1343(3), and 2201. For reasons stated in this opinion, the requested relief will be granted.

The California governmental body now designated as the New Motor Vehicle Board (the Board) was created within the Department of Motor Vehicles by statute in 1967 and given responsibility for the licensing of new car dealers (California Vehicle Code §§ 3000 *et seq.*). In 1973, the California Automobile Franchise Act (the Act) added §§ 3060 to 3069 to the Vehicle Code, thereby giving the additional powers and functions to the Board that are challenged in this action.

Section 3062 provides that before an automobile manufacturer (franchisor) may establish an additional motor vehicle dealership (franchisee) or relocate an existing dealership, the franchisor must first give written notice of such intention to the Board and to each dealer for the same "line-make" of automobile within the "relevant market area." Such area is defined as ". . . any area within a radius of

10 miles from the site of a potential new dealership.” (Vehicle Code § 507).

Any dealer receiving such notice may, within fifteen days thereafter, file with the Board a protest to the establishing or relocating of the dealership. When such a protest is filed, the Board is obliged automatically to issue an order to the franchisor that the proposed establishment or relocation of the franchisee may not take place pending a hearing on the merits of the protest and a final decision by the Board.

It is a misdemeanor for a franchisor to establish or relocate a franchisee in violation of an order of the Board (Vehicle Code §§ 11713.2(1) and 40000.11), and such violation is grounds for suspension or revocation of the license of a manufacturer or dealer to do business in California (Vehicle Code § 11705(a)(10)).

Section 3066(a) provides that, “Upon receiving a notice of protest,” the Board shall issue an order fixing a time for the hearing, which shall be commenced within sixty days following such order. As the foregoing describes, the receipt by the Board of a protest automatically triggers both the order staying the proposed action by the franchisor and the order setting the hearing. The statute does not specify clearly that the same communication shall contain both orders or, if not, when one shall be issued in relation to the other. Although in the present instance concerning plaintiff Orrin W. Fox Co., the Board waited six weeks after issuing the injunction (on May 29) before it sent out the order setting the hearing (on July 8),

we are inclined to interpret the Act as requiring the injunction and the order to be promulgated concurrently.

The hearing may be conducted by the Board or by a hearing officer designated by the Board. Testimony of witnesses and documentary evidence may be presented by the parties, as well as by "other interested individuals and groups." (Vehicle Code § 3066(a)).

If the matter is heard by the Board and the Board fails to act within thirty days after such hearing, the proposed action is deemed to be approved (§ 3067). If the matter is heard by a hearing officer, he is required to prepare and submit in writing a proposed decision to the Board (Government Code § 11517(b)), and there is no time limit within which this must be accomplished. The Board may affirm or reverse the decision of the hearing officer, and, once again, if the Board does not act within thirty days, the proposed establishment or relocation of the franchisee is deemed approved (Vehicle Code § 3067). However, the Board may also decide to take additional evidence or refer the matter back to the hearing officer for further proceedings (Government Code § 11517(c)), in which event there is no time limit imposed other than the requirement that the decision be made "... within such ... period as may be necessitated ..." by the additional proceedings (Vehicle Code § 3067).

Thus, by the simple means of filing a protest, an automobile dealer can prevent a new competitor from being established, or an existing competitor from being relocated in new facilities, within ten miles of

the protesting dealer for at least ninety days plus as long as it may take for a hearing officer to submit ment of such additional proceedings as the Board may in writing a proposed decision and for the accomplish-direct. Plans to establish a dealership in a particular location necessarily involve commitments for the purchase or lease of real property, construction or alteration of premises, and for the acquiring of personnel, equipment and stock in trade. Bearing these things in mind, an actual or potential delay of three months, and perhaps much more, brought about by the filing of a protest could seriously hamper or even completely destroy the consummation of such plans.

Little imagination is needed in order to visualize how appealing such a prospect might be to a competing automobile dealer, particularly, inasmuch as his protest need not be accompanied by any showing whatever of probably (*sic*) success, irreparable injury if his protest is not granted, or a bond or any other undertaking.

The manner in which the passage of the Act and the administration thereof have affected the present plaintiffs is revealed in the uncontradicted affidavits and documentary exhibits submitted by the parties. The only Buick dealer in Pasadena terminated his franchise early in 1974, and a replacement dealer had not been established until May 1975, when plaintiffs General Motors and Orrin W. Fox Co. executed a franchise agreement. Protests promptly were filed by Buick dealers located in the nearby cities of Monrovia and San Gabriel on about May 22, 1975. On

May 29, 1975, the Board sent letters to General Motors advising of the protests and stating that "you may not . . . establish the proposed dealership until the Board has held a hearing as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership." The letter also advised that the Board would later fix a time for the hearing and would advise accordingly. On July 8, 1975, the Board assigned the dates of August 11 and 12, 1975, for the hearing.

However, as the result of requests for continuance by the protesters and by stipulation, and protracted litigation in the courts concerning the right to take pre-hearing depositions, the protests were reset for hearing on September 15, 1976. They therefore were still pending when the present action was filed, on April 13, 1976.

The foregoing recital shows that, under the provisions of the Act, the protesters were able to prevent plaintiff Fox from being established as a potential (although geographically rather remote) competitor for more than fifteen months (including the entire 1976 Buick model year), without any official consideration being given to the merit or lack of merit of the protests. Fox understandably assesses at many thousands of dollars its damages occasioned by such delay.

Plaintiff Muller Chevrolet took over an existing dealership in the Montrose section of Glendale in 1973. It soon became apparent to Muller that its physi-

cal facilities were completely inadequate and rapidly deteriorating and that a move to a new and much larger location was mandatory. In December 1974, Mr. Muller learned that the location of the current Volkswagen dealership in the adjacent community of La Canada might become available. Negotiations were begun that were contingent upon the Volkswagen dealer finding a new site for his operation, and upon the ability of the parties to finance their respective moves. After a year of complex and time consuming negotiations, an agreement was reached in December 1975 and the required notice of intention to relocate was served upon the Board and the surrounding Chevrolet dealers on about January 16, 1976. A few days later, Chevrolet dealers in Pasadena and Tujunga, respectively, filed with the Board letters saying, in effect, no more than "I protest," and on February 6, 1976, the Board responded by enjoining the proposed relocation pending a hearing on the protests. About two weeks later, on February 23, 1976, the Board "tentatively" set the hearing for June 23 through 25, 1976, and on April 21, 1976, issued a formal order confirming those dates. It is worthy of note here that such hearing was scheduled for a time more than four months after the injunction had been issued.

It appears from a supplemental affidavit filed by Mr. Muller on September 17, 1976, that the scheduled hearing took place before a hearing officer and that the latter rendered a decision favorable to the proposed relocation on about August 20, 1976. Then

began the thirty-day waiting period within which time the Board might act upon that decision before the proposed relocation could be deemed approved and the injunction finally lifted (Vehicle Code § 3067). On September 14, 1976, before the end of such waiting period, Muller was advised that the new leasehold premises were no longer available for his dealership because of his long failure to take possession and otherwise assume the obligations of the lease. Muller thereupon "gave up" with respect to this litigation and is starting all over again in his attempt to find a new site for his business.

We find that the hereinabove described procedures mandated by the California statute are in gross violation of the Due Process Clause of the Fourteenth Amendment. As the Supreme Court has said, the right to the liberty proclaimed by that provision of the Constitution ". . . denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, . . . and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Certainly, the right to grant or undertake a Chevrolet dealership and the right to move one's business facilities from one location to another are included within this protection. Of course, the right to do these things is not unlimited. Legitimate conflicting interests of other individuals and of the public as a whole often require that restrictions be imposed. The Fourteenth

Amendment requires only that such restrictions be administered in accordance with the procedural safeguards that have been established over the years as constituting due process of law.

One of the basic requirements of due process is that the "liberty" of a person may be curtailed only after a hearing. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); see, *Mullane v. Central Hanover Bank*, 339 U.S. 306, 313 (1950).

"[I]t is now well settled that a temporary non-final deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment.

* * *

The Fourteenth Amendment draws no bright lines around 3-day, 10-day, or 50-day deprivations of property. . . . While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind."

Fuentes v. Shevin, 407 U.S. 67, 84-86 (1972).

Here, the plaintiffs were deprived of their rights for many months without any hearing whatever.

It is true, as the defendants point out, that there are extraordinary situations in which some valid governmental interest is at stake that justifies immediate interference with the rights of a person before a noticed hearing can be accomplished. For example, the Supreme Court has upheld statutes permitting governmental agencies summarily to seize operational

control of banking institutions in serious financial difficulty. *Fahey v. Mallonee*, 332 U.S. 245 (1947). See also, *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950), in which a procedure for summary seizure of misbranded drugs by the Food and Drug Administration was upheld. But such procedures are justified only when a responsible public official concludes that to delay action pending a hearing would likely result in serious harm to the public. Here, there is no provision in the Act for any public official to exercise his discretion as to whether the public interest requires that immediate action be taken in advance of a hearing; instead, the injunction automatically follows a simple protest by a competitor.

There are, of course, instances in which concepts of due process will also permit private parties to obtain judicial orders that restrain their adversaries from taking actions pending a hearing to determine whether the challenged actions should be enjoined as being in violation of the legitimate interests of the complainants. But the party seeking such a restraining order must make a persuasive showing that to delay injunctive relief until after a hearing would result in irreparable injury to him, and that he would be likely to prevail in such hearing. Even with such a showing, a pre-hearing restraining order is normally limited to ten days. See, for example, Rule 65(b) of the Federal Rules of Civil Procedure. There is also the normal requirement of a bond to insure the enjoined party against loss occasioned by an improvidently issued restraining order. None of these requirements of due process are provided for in the Act.

The defendants urge that the Act is not constitutionally defective in its operation because the plaintiffs could have filed and circulated their notices of intention early in their negotiations, and long before consummating their transactions, thus shortening or perhaps avoiding the delay between readiness to operate and the hearing. In the case of Muller, it appears that the negotiations for the lease of the new premises were protracted and involved many problems that were uncertain of satisfactory solution. It would hardly have been practicable for Muller to publish an intention to relocate, thus inspiring almost inevitable protest, and go through an expensive hearing without knowing that the desired premises were available. It is also not hard to imagine the dampening effect upon the negotiations that would be imposed by the awareness of the long delay in completion of the transaction that any irresponsible protest could inherently cause.

Apart from these practical considerations, the short answer to the defendants' contention is that the plaintiffs had a constitutional right to do what they wanted to do, subject only to the restrictions of due process herein discussed.

In light of the foregoing, it is evident to us that the Act is unconstitutional as being in violation of the Due Process Clause of the Fourteenth Amendment. Having upheld the plaintiffs' challenge on this ground, it is unnecessary for us to consider their alternative claim that the Act is invalid under the Supremacy Clause of the Constitution because it is in inherent conflict with the federal antitrust laws.

However, before rendering a judgment for the plaintiffs, we must resolve an additional problem that has been troubling us from the inception of this action, namely, whether or not principles of comity require, or even permit, that we abstain from adjudicating this matter. We are fully mindful of the teaching of Justice Black, in *Younger v. Harris*, 401 U.S. 37, 44 (1971), that the notion of comity denotes "... a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." We are in complete accord with this concept, and we are aware that the courts of California are just as dedicated to preserving the principles of the United States Constitution as are we. Our decision in this matter has been withheld for several months in the hope that one of the cases pending against the Board in state courts would result in an adjudication that would deal with the constitutional problem here presented. However, this has not occurred,* and we are obliged to act, particularly in light of the rule laid

*On May 23, 1977, the California Court of Appeal (Third District) affirmed a trial court ruling that the Act was unconstitutional because four of the nine members of the Board are required to be new car dealers, and thus presumably antagonistic to franchisors. *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 C.A.3d 983 (1977). The Legislature and the Governor promptly responded by enacting (on June 24, 1977) and approving (on July 7, 1977), an amendment to the Act which provides that only the non-new car dealer members of the Board may decide matters involving protests. The amendment made no other change in the procedures established by the Act.

down in *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971):

“ . . . abstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal courts should not abstain but should proceed to decide the federal constitutional claim. . . . We would negate the history of the enlargement of the jurisdiction of the federal district courts, if we held the federal courts should stay its hand and not decide the question before the state courts decided it.”

As is discussed above, we find the Act to be clearly unconstitutional, and there is no ambiguity that could be resolved in such manner as to harmonize it with the requirements of due process. Accordingly, a judgment declaring such unconstitutionality and enjoining enforcement of the provisions of the Act pertaining to protest procedure is being filed contemporaneously herewith. This opinion shall constitute findings of fact and conclusions of law, as authorized by Rule 52(a) of the Federal Rules of Civil Procedure.

Dated: September 14, 1977.

William P. Gray
United States District Judge

Appendix B

United States District Court
Central District of California

No. CV 76-1200-WPG

Orrin W. Fox Co., a corporation, Muller Chevrolet, a corporation, and General Motors Corporation,

Plaintiffs,

vs.

New Motor Vehicle Board of the State of California; Melicio H. Jacaban, Audrey B. Jones, John D. Barnes, John Onesian, Winfield J. Tuttle and John B. Vandenberg, as members of the New Motor Vehicle Board; Sam W. Jennings, as Executive Secretary of the New Motor Vehicle Board; Department of Motor Vehicles of the State of California; and Herman Sillas, as Director of the Department of Motor Vehicles,

Defendants, and

Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California,

Intervening Defendants.

[Filed Sept. 14, 1977]

SUMMARY JUDGMENT

The motion of plaintiffs Orrin W. Fox Co., Muller Chevrolet and General Motors Corporation has been submitted for decision by this three-judge court after having been briefed and orally argued. In accordance with the Memorandum of Decision being filed contem-

poraneously herewith, and the court having found that there is no just reason for delay in the entry of judgment,

It Is Ordered, Adjudged And Decreed that:

1. The California Automobile Franchise Act (California Vehicle Code §§ 3060-69) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by depriving motor vehicle manufacturers and their prospective and existing dealers of liberty and property without prior notice and the opportunity to be heard.

2. The California Automobile Franchise Act violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to provide for a prompt hearing on the merits following the initial peremptory deprivation of liberty and property.

3. Defendants, their agents, and any persons acting on their behalf, at their direction or under their control are hereby enjoined from taking any action to implement or enforce the Act's provisions.

4. Plaintiffs shall recover their costs herein in the amount of \$.....

Dated: September 14, 1977.

Walter Ely
United States Circuit Judge
William P. Gray
United States District Judge
Robert M. Takasugi
United States District Judge

Appendix C

CALIFORNIA VEHICLE CODE SECTIONS

* * *

§ 507. *Relevant Market Area*

The "relevant market area" is any area within a radius of 10 miles from the site of a potential new dealership.

* * *

§ 3060. *Termination of Franchise*

Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) The franchisee and the board have received written notice from the franchisor as follows:

(1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentations by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(b) The board finds that there is good cause for termination or refusal to continue, following a

hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. When such a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

The franchisor shall not modify or replace a franchise with a succeeding franchise if such modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor shall have first given the board and each affected franchisee notice thereof at least 60 days in advance of such modification or replacement. Within 30 days of receipt of such notice, a franchisee may file a protest with the board and such modification or replacement shall not become effective until there is a finding by the board that there is good cause for such modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, such prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

§ 3061. *Good Cause*

In determining whether good cause has been established for modifying, replacing, terminating,

or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(3) Permanency of the investment.

(4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee's failure to comply with the terms of the franchise.

§ 3062. *Establishing or Relocating Dealerships*

In the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership within or into a relevant market area where the same line-make is then represented, the franchisor shall in writing first notify

the board and each franchisee in such line-make in the relevant market area of his intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 15 days of receiving such notice or within 15 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

§ 3063. *Good Cause*

In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board should take into consideration the existing circumstances, including, but not limited to:

- (1) Permanency of the investment.
- (2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

(3) Whether it is injurious to the public welfare for an additional franchise to be established.

(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

* * *

§ 3066. *Hearings on Protests*

(a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notifications by the board of protests and decisions of the board. The board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515, and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good

cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

§ 3067. *Decision*

The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. If the board fails to act within 30 days after such hearing, within 30 days after the board receives a proposed decision where the case is heard before a hearing officer alone, or within such period as may be necessitated by Section 11517 of the Government Code or as may be mutually agreed upon by the parties, then the proposed action shall be deemed to be approved. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail, as well as to all individuals and groups, which have requested notification by the board of protests and decisions by the board. The decision shall be final upon its delivery or mailing and no reconsideration or rehearing shall be permitted.

§ 3068. *Judicial Review*

Either party may seek judicial review of final decisions of the board. Time for filing for such review shall not be more than 45 days from the date on which the final order of the board is made pub-

lic and is delivered to the parties personally or is sent them by registered mail.

§ 3069. *Application of Article*

The provisions of this article shall be applicable to all franchises existing between dealers and manufacturers, manufacturer branches, distributors and distributor branches at the time of its enactment and to all such future franchises.

* * *

Appendix D

United States District Court
Central District of California

No. CV 76-1200-WPG

Orrin W. Fox Co., a corporation, Muller Chevrolet, a corporation, and General Motors Corporation,

Plaintiffs,

vs.

New Motor Vehicle Board of the State of California; Melicio H. Jacaban, Audrey B. Jones, John D. Barnes, John Onesian, Winfield J. Tuttle and John B. Vandenberg, as members of the New Motor Vehicle Board; Sam W. Jennings, as Executive Secretary of the New Motor Vehicle Board; Department of Motor Vehicles of the State of California; and Herman Sillas, as Director of the Department of Motor Vehicles,

Defendants, and

Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California,

Intervening Defendants.

[Filed Oct. 14, 1977]

NOTICE OF APPEAL

To the Clerk of the above-entitled Court:

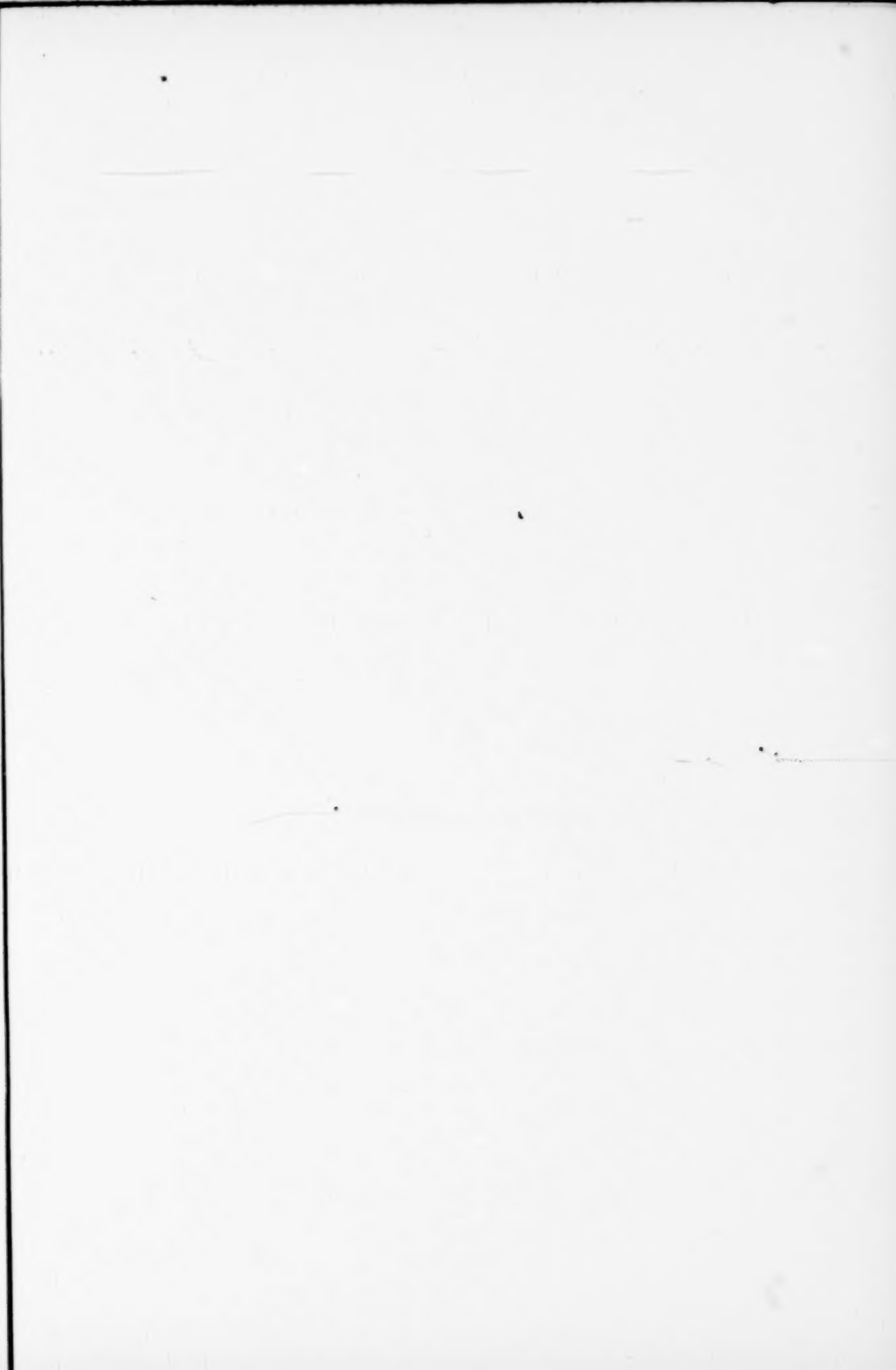
Please take notice that the intervening defendants Northern California Motor Car Dealers Association

and Motor Car Dealers Association of Southern California hereby appeal to the Supreme Court of the United States from that certain partial summary judgment entered on September 15, 1977, as amended, and from all parts of said partial summary judgment.

Dated: October 13, 1977.

Crow, Lytle & Gilwee
James R. McCall, Professor of Law,
U.C. Hastings, of Counsel

By Richard E. Crow,
431 J Street
Sacramento, California 95814
Telephone: (916) 441-2980
Attorneys for Intervening Defendants
Northern California Motor Car
Dealers Association and Motor Car
Dealers Association of Southern California



Supreme Court, U. S.

FILED

MAY 8 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1977

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION
and MOTOR CAR DEALERS ASSOCIATION OF
SOUTHERN CALIFORNIA,
Appellants,

vs.

ORRIN W. FOX Co., a corporation,
MULLER CHEVROLET, a corporation,
and GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court,
Central District of California

BRIEF FOR APPELLANTS

JAMES R. McCALL,

Professor of Law, U. C. Hastings, Of Counsel,

CROW, LYTLE, GILWEE,

DONOGHUE, ADLER & WENINGER,

431 J Street,

Sacramento, California 95814,

Telephone: (916) 441-2980,

Attorneys for Appellants.



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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION
and MOTOR CAR DEALERS ASSOCIATION OF
SOUTHERN CALIFORNIA,
Appellants,

vs.

ORRIN W. FOX Co., a corporation,
MULLER CHEVROLET, a corporation,
and GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court,
Central District of California

BRIEF FOR APPELLANTS

Appellants appeal from the summary judgment of a three judge court of the United States District Court, Central District of California entered on September 15, 1977. The judgment appealed from permanently enjoined the New Motor Vehicle Dealer Board of the State of California ("Board") and other officials of the State of California from performing their duties as prescribed by certain provisions of the

California Automobile Franchise Act (California Vehicle Code §§3060-3069) ("Act"), on the ground that certain provisions of the Act violate the Due Process Clause of the Fourteenth Amendment. Appellants were made defendants in intervention in the action by uncontested order of the district court, and will hereafter usually be referred to as "intervenor". The Board and other California state officials enjoined by the district court are also appealing the district court judgment to this Court in action No. 77-837 entitled *New Motor Vehicle Board of the State of California, et al. v. Orrin W. Fox Co., et al.* Action No. 77-837 has been consolidated with the instant appeal by order of this Court on February 21, 1978.

OPINION BELOW

Unofficial reports of the opinion of the court below appeared at 834 Antitrust & Trade Regulation Report, page D-1 (October 13, 1977) and 46 United States Law Week 2188 (October 18, 1977), and the opinion was reported in full as *Orrin W. Fox Co. v. New Motor Veh. Bd., etc.*, 440 F.Supp. 436 (C.D. Cal. 1977).

JURISDICTION

This action was brought to enjoin the enforcement by California state officials of the California Act, on the grounds that the statute is unconstitutional. It was filed on April 13, 1976, while §2281 of Title 28

of the United States Code was fully effective. Under the terms of §2281 this action was required to be, and was, heard and determined by a district court of three judges pursuant to 28 U.S.C. §2284. The right of appeal to this Court from an injunction in a civil action required to be heard by a three judge district court is established by 28 U.S.C. §1253. Decisions which sustain the Court's jurisdiction in cases of this type include: *Hicks v. Miranda*, 422 U.S. 332, 342-343, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) and *United States v. Georgia Public Service Commission*, 371 U.S. 285, 287-288, 83 S.Ct. 397, 9 L.Ed.2d 317 (1963). A Jurisdictional Statement was timely filed by intervenors, and probable jurisdiction noted by this Court on February 21, 1978.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves Article I, section 8, clause 1 and Article VI, clause 2 of the United States Constitution, and Amendment XIV, section 1 to the United States Constitution. The California statutes involved are California Vehicle Code §§507, 3060-3063, 3066-3069 and 11713.2(1). These provisions are set forth in the Appendix following this brief.

QUESTIONS PRESENTED

1. Is the expectation of establishing or relocating a retail automobile franchise a liberty or property interest which is protected by the procedural guaran-

tees of the Due Process Clause of the Fourteenth Amendment?

2. Assuming that the procedural guarantees of the Due Process Clause protect the expectation of establishing or relocating a retail automobile franchise, do those procedural guarantees require the State of California to provide an evidentiary hearing to persons holding that expectation prior to issuing an order which may delay the establishment or relocation of the franchise for a period of up to ninety days pending the outcome of an evidentiary hearing on the issue of whether there is good cause for permanently prohibiting the establishment or relocation of the franchise?

3. Should the district court judgment be affirmed on the basis of an argument, unconsidered by, but advanced before the district court that the terms of the Act conflict with the federal antitrust laws and are therefore invalid under the Supremacy Clause of the United States Constitution?

STATEMENT OF THE CASE

The Board was created by California statute in 1967 and given responsibility for the licensing of new automobile retail dealers in that state. The Board was also given the statutory power to review decisions of the Department of Motor Vehicles of the State of California ("Department") imposing discipline upon licensed new car dealers, the power to investigate public complaints concerning any licensed dealer and

the power to undertake to arbitrate any dealer-customer dispute or to recommend disciplinary action to the Department regarding the dealer involved. The Board, as created, consisted of nine members, four of whom had to be new car dealers, licensed as such for not less than five years.

In 1973, the duties and responsibilities of the Board were substantially broadened by the passage of the Act. The Board was now given the additional power to review disciplinary decisions of the Department regarding the California license of any automobile manufacturer, distributor, or manufacturer's representative, and to receive and arbitrate or recommend Department action on any public complaints concerning any automobile manufacturer, distributor or manufacturer's representative.

The 1973 Act also established certain adjudicatory functions for the Board as part of a rather detailed legislative scheme for regulating certain aspects of the relationship between automobile manufacturers and their California retail dealers. The Act prohibits any automobile manufacturer (hereafter sometimes "franchisor") from terminating any franchise which it has with a California automobile dealer (hereafter sometimes "franchisee") without first giving advance notice to the franchisee and to the Board, and the Act also requires franchisors to provide reasonable compensation to any dealer-franchisee as reimbursement for automobile delivery and preparation expenses and for manufacturer warranty servicing expenses incurred by a franchisee in connection with selling and

servicing the franchisor's automobiles. (California Vehicle Code §§3060, 3064 and 3065) If the affected franchisee protests the termination of its franchise to the Board there can be no termination unless the Board finds that good cause exists for the termination in an evidentiary hearing. (California Vehicle Code §§3060, 3061, 3066-3069)¹ Similarly, upon protest by franchisee, the Board is given the power and duty to determine whether a franchisor has paid reasonable compensation to reimburse the protesting franchisee for delivery and preparation expense or for expense of warranty servicing. (California Vehicle Code §§3064-3069)

Another related feature of the 1973 Act triggered the litigation at bar. Vehicle Code §3062 provides that an automobile manufacturer may not establish a new franchisee or relocate an old franchisee without first giving written notice of such intention to the Board and to each of its existing franchisees for the same

¹Federal legislation directed at protecting new car dealers from abusive and oppressive acts of automobile manufacturers, including bad faith franchise termination, was enacted by Congress in 1956 with the passage of the Automobile Dealers' Day in Court Act (15 United States Code §§1221-1225). Perhaps partly because the Dealers' Day in Court Act contains language which is tantamount to an invitation to states to legislate on the subject of automobile manufacturer-dealer relationships (see 15 U.S.C. §1225), thirty-eight states and the Commonwealth of Puerto Rico have statutes which afford protection to dealers from abusive or coercive acts of automobile manufacturers, generally including specific prohibition of arbitrary manufacturer terminations of franchisees without good cause, e.g., Florida Statutes §§320.64(8) and 320.641; New York General Business Law §197; 63 Pennsylvania Statutes §805(2)(xi) and Texas Civil Statutes, art. 4413(3), §5.02(3).

“line-make” of automobile located within the “relevant market area”. Such area is defined in Vehicle Code §507 as “. . . any area within a radius of 10 miles from the site of . . . [the] . . . potential new dealership.” If any of the existing franchisees within the market area protest to the Board within 15 days of receiving such notice, the Board must issue an order temporarily prohibiting the franchisor from establishing or relocating the proposed dealership until the board has held a hearing to determine if there is good cause for refusing to permit the proposed dealership to be established. If the Board, at such hearing, determines that good cause exists for *not* permitting the proposed dealership, the franchisor may not do so.² The protesting franchisee has the burden of proving that good cause exists for not permitting the franchise to be established at the Board’s hearing which must be held within 60 days of the Board’s order temporarily prohibiting the franchisor from establishing or relocat-

²At least seventeen other states have legislative provisions similar to those in the Act, establishing certain conditions, or requiring a determination by a state board or official, before a manufacturer can establish a new dealer-franchisee within the relevant marketing area of an existing dealer-franchisee who sells the same line-make of the manufacturer’s automobiles. As noted in *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, _____ U.S. _____, 98 S.Ct. 359, 363 (footnote 4), _____ L.Ed.2d _____ (1978), these statutes include: Ariz.Rev.Stat. §28-1304.02; Colo.Rev.Stat. §13-11-20; Fla.Stat. §320.642; Ga.Code §84-6610(f)(8)(10); Hawaii Rev. Stat. §437-28(a),(b)(22); Iowa Code Ann. §322A.4; Mass.Stat. Ann. ch. 93B, §4(3)(1); Neb.Rev.Stat. §60-1422; N.H.Rev.Stat. Ann. §§357-B:4 (III)(1); N.M.Stat. Ann. ch. 64; N.C.Gen.Stat. §20-305(5); R.I. §31-51-4(C)(11); S.D.Laws §§32-6A-3, 32-6A-4; Tenn.Code Ann. ch. 17, §59-1714(j); Vt.Stat. Ann. Tit. 9, ch. 107, §4074(c)(9); Va.Code Ann. §46-1-547(d); Wis.Stat. Ann. §218.01 (3)(8); W.Va.Code vol. 14, §47-17-5(i).

ing the proposed franchise. (California Vehicle Code §3066)³ Within 30 days after the hearing (or the receipt of a proposed decision from a hearing officer if such an officer is designated by the Board to hold the hearing), the Board must render its decision, or else the establishment of the proposed franchise is deemed approved. (California Vehicle Code §3068) It is unlawful for a franchisor to establish or relocate a franchise in violation of an order of the Board. (California Vehicle Code §11713.2(1))

Appellees herein filed suit on April 13, 1976 in the United States District Court, Central District of California, seeking a three judge court determination that the Act was unconstitutional and that its enforcement should be enjoined. (A. 1-26) Appellee Orrin W. Fox Co. ("Fox") claimed to have executed a General Motors Corporation ("GM") franchise agreement in May, 1975, with appellee GM under which Fox was to

³In any hearing conducted by the Board following a dealer protest under Vehicle Code §3062, all new car dealer members of the Board are prohibited by Vehicle Code §3066(d) from participating in any way. The prohibition in Vehicle Code §3066(d) against dealer Board member participation also applies to hearings held under the three other sections of the Act which establish a requirement of a Board hearing upon a dealer protest, to wit: §3060 (protest of franchise termination), §3064 (protest of failure of manufacturer to provide for reasonable reimbursement to dealer for car delivery and preparation expense) and §3065 (protest of failure of manufacturer to provide for reasonable compensation to dealer for manufacturer warranty servicing expense). Vehicle Code §3066(d) was added to the Act by the California Legislature following *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 C.A.3d 983, 138 Cal.Rptr. 594 (Cal. Ct. of Appeal 1977), in which participation by dealer members in Board protest hearings was held unconstitutional.

be a newly established Buick dealer in Pasadena, California. Appellee Muller Chevrolet ("Muller") claimed to have made arrangements for a transfer of his existing GM Chevrolet franchise from Glendale to La Canada, California in December, 1975. The proposed establishment of both the Fox and Muller franchises were protested by the existing Buick and Chevrolet dealers, respectively, in the two relevant market areas in timely fashion under Vehicle Code §3062. The Board responded with orders prohibiting the establishment of the proposed franchises until it could hold hearings under Vehicle Code §3066. For various reasons neither protest proceeded to a Board hearing prior to the filing of the within action by the three appellees.

In their Motion for Partial Summary Judgment, appellees claimed that the Act violated their procedural due process rights under the Due Process Clause of the Fourteenth Amendment and was also invalid under the Supremacy Clause because it was in inherent conflict with the federal antitrust laws. (A. 104-136) The three judge district court specifically addressed only the first of appellees' arguments in granting a Summary Judgment holding the entire California Automobile Franchise Act unconstitutional on its face. (Intervenors' Jurisdictional Statement, Appendix pages xi-xiii) The district court enjoined the enforcement of the Act on the sole ground that, in the court's opinion, the Act deprived appellees of their due process protected rights to hearings prior to the deprivation of their liberty and property interests in

establishing new, or relocating existing, automobile dealerships.⁴

The Summary Judgment granted by the district court also stated an alternative ground for holding the Act unconstitutional on its face even though this alternative ground was unmentioned in its Memorandum of Decision. The alternative ground so stated is that the Act fails to provide for a prompt hearing on the merits following the initial temporary deprivation of appellees' liberty and property interest in establishing a new or relocated dealership. This "alternative ground" is directly contradicted by the terms of the Act, which provides that the Board must hold a hearing within 60 days following the issuance of a temporary order (California Vehicle Code §3066) and that the Board must render its decision within 30 days after the hearing (California Vehicle Code §3068). In appellees' Motion to Affirm, they apparently have chosen to abandon the "alternative ground", because the Motion makes no reference to it.

On December 6, 1977, upon application by appellant Board, this Court issued a stay of the district court judgment, Justice Rehnquist, writing. (*New Motor Vehicle Board of Cal. v. Orrin W. Fox Co.*, U.S.

⁴While the district court ruled that the entire California Automobile Franchise Act (Vehicle Code §§3060-3069) was unconstitutional, only Vehicle Code §§3062 and 3063 and the references to §3062 contained in Vehicle Code §3066 were involved in the litigation before the district court. Thus the other provisions of the Act would appear to have been gratuitously voided even though they do not involve the asserted Constitutional infirmity which the district court found in §§3062 and 3063 and the references to §3062 in §3066.

....., 98 S.Ct. 359, Law Ed.2d 1977). The Stay Order contains a lucid, and thoroughly convincing, review of past decisions of this Court which establish that, at least in the opinion of Justice Rehnquist, the appellants possess neither a "liberty" nor "property" interest within the meaning of the Fourteenth Amendment to the United States Constitution.

Automobile manufacturers have challenged the validity of a number of state statutes which are similar in effect to California Vehicle Code §3062. In *General GMC Trucks, Inc. v. General Motors Corp.*, 329 Ga. 373, 237 S.E.2d 194, *cert. denied*, U.S., 98 S.Ct. 634, 54 L.Ed.2d 491 (1977), the Georgia Supreme Court held a similar Georgia statutory provision (Georgia Code Annotated §84-6610(f)(10)) to be unconstitutional as an undue burden on interstate commerce. Earlier this year the United States District Court for the Eastern District of Virginia held a similar Virginia statutory provision (Code of Virginia §46.1-548(d)) to likewise be an unconstitutional burden on interstate commerce. (*American Motors Sales Corporation v. Division of Motor Vehicles of the Commonwealth of Virginia*, F.Supp. (E.D. Va. 1978), see 854 Antitrust and Trade Regulation Report, page F-1 (March 9, 1978).) The American Motor Sales Corporation decision is, intervenors assume, pending before the Fifth Circuit Court of Appeals at this time. Both the Georgia and Virginia statutes were essentially similar to California Vehicle Code §3062 except that the statutes involved in those cases required that a hearing by a single official, rather

than a Board, be held upon a dealer protest to determine if a manufacturer could insert an additional franchisee in a market area already served by an existing franchisee. While appellees asserted that California Vehicle Code §3062 constitutes an undue burden on interstate commerce in their Complaint (A. 5, 22-23), they did not argue, or in any way advance, this proposition before the district court below when they moved for a summary judgment.

ARGUMENT

- I. **APPELLEES CLEARLY ARE NOT ASSERTING INDIVIDUAL INTERESTS WHICH QUALIFY AS "LIBERTY OR PROPERTY" UNDER THE FOURTEENTH AMENDMENT, THUS THE PROCEDURAL GUARANTEES OF THAT AMENDMENT ARE NOT APPLICABLE.**

Appellees Fox and Muller each possess a desire to operate automobile dealerships, and to obtain future benefits from doing so, while appellee GM possesses a desire to franchise each of them to operate dealerships. Such business desires or expectation of future benefits are clearly not within the limited class of interests which this Court has stated are included within the phrase "liberty or property" in the Due Process Clause in the Fourteenth Amendment. The district court avoided any discussion of, or the making of any finding on, this point in its Memorandum of Decision ("Decision"). However, such a determination must be made under the "familiar two step analysis" which must be undertaken when the claim of a violation of the procedural due process rights of a citizen is made: first, a determination of whether the

asserted interest of the citizen is encompassed within the Fourteenth Amendment's protection of "life, liberty or property", and second, if protected interests are implicated, what procedures constitute "due process of law". (*Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 1413, 53 L.Ed.2d 257 (1977))

In a considerable number of decisions in recent years, all unmentioned in the district court's Decision, this Court has clearly established that a mere expectancy of continued employment or a future contractual benefit is not entitled to procedural due process protection because such an expectancy is neither a property interest nor a liberty under the Amendment. Although appellees' asserted interest would appear to be more likely to be held to be "property" than a "liberty", the decisions of this Court clearly establish that they cannot be classified as the former. In *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1971) and *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1971) this Court established that due process protects an interest in an intangible asset, such as a future contractual benefit or government benefit, as "property", only when a citizen's right to the benefit is established by a state's rules or by mutually explicit understandings with the state. (See 408 U.S. at 576-578 and 408 U.S. at 601-603). Assuming there is no allegation of the state having bound itself contractually to provide the expected future benefit, the requisite establishment can be supplied only by the laws of the state involved. (*Bishop v. Wood*, 426 U.S. 341, 344-347, 96 S.Ct. 2074, 48

L.Ed.2d 684 (1976)) There is no claim or allegation by appellees that their asserted interests in expected future contractual benefits is based upon any law of the State of California or any mutually explicit agreement with the State of California. Thus their expectations are not "property" for procedural due process purposes.

It is also clear that none of the expectations entertained by the appellees could qualify as a procedural due process protected "liberty". The cases mentioned above, as well as *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) make it plain that such liberties must be found either in the Bill of Rights, or have been recognized and protected by state law. No claim or assertion of such a source for the protection of appellees' expectations is made, and none can be.⁵

The points made here were better stated in Justice Rehnquist's Stay Order. (*New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, *supra*, 98 S.Ct. at 361-363)

⁵In appellees' Motion to Affirm, they make a gesture toward an argument that the right to locate an automobile franchise in any place a dealer desired was defined and protected by California law as a Fourteenth Amendment protected interest prior to passage of the Act. However, the authorities cited for this novel assertion are unconvincing. Appellees cite California Vehicle Code §11712(a), which merely imposes a *duty* upon a licensed automobile dealer to maintain a place of business and to notify the California Department of any change in location, and *Ralph Williams Ford v. New Car Dealers Policy & Appeals Bd.*, 30 Cal.App.3d 494, 500-501, 106 Cal.Rptr. 340, 344 (1973), which merely recognizes the obvious principle that the holder of an *existing occupation license* is entitled to the procedural protection of the Due Process Clause before it may be revoked. Neither the statute nor the case deals with the right to establish a dealership whenever a dealer may choose, much less do they confer, establish or "protect" that "right."

As the Stay Order also points out, the *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) decision relied upon so heavily by the district court (Intervenors' Jurisdictional Statement, Appendix page viii) was an example of the economic "substantive due process" reasoning abandoned many years ago by this Court and is a less than compelling precedent for determining procedural due process issues fifty-five years after it was decided.

In that the Decision of the district court contains any analysis of the question of whether the appellees' expectations constitute either property or liberty under the Due Process Clause, it seems to implicitly adopt the position that the grievous losses which allegedly may be suffered by the appellees without an adjudication prior to a Board order delaying the establishment of a franchise require that due process procedural guarantees be afforded appellees. However, this Court has often stated that it is the nature of the interest asserted which must implicate the Due Process Clause, and not the harmful consequences or "grievous loss" allegedly occasioned by the failure to apply due process procedural guarantees. (*Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 97 S.Ct. 2094, 2108, L.Ed.2d (1977); *Meachum v. Fano*, 427 U.S. 215, 224, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976); *Board of Regents v. Roth*, *supra*, 408 U.S. at 570-571, 92 S.Ct. at 2705)

The reasoning of the district court constitutes a complete departure from the analysis which this Court

has so clearly mandated for the resolution of procedural due process issues. The district court's Decision creates a new class of procedural due process protected interests—business desires and expected future contractual benefits. This new class of “protected” interests would expand the scope of application of the Fourteenth Amendment to an almost unimaginable degree.

Unless the Decision is reversed by this Court, the reasoning it contains and the determination it makes will jeopardize or negate thousands of state licensing and business regulation laws, including those state laws specifically dealing with the relationship between automobile manufacturers and dealers.⁶

II. THE PROCEDURE DETAILED IN THE CALIFORNIA AUTOMOBILE FRANCHISE ACT SATISFIES THE REQUIREMENTS FOR “THAT PROCESS WHICH IS DUE” EVEN IF THE INTERESTS ASSERTED BY THE APPELLEES WERE DESERVING OF PROCEDURAL DUE PROCESS PROTECTION.

The district court Decision does not mention the analysis established as mandatory by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 332-335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1975), and restated and applied in *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977) and by Justice Marshall in his concurring opinion in *Board of Curators of University of Mo. v. Horowitz*, U.S., 98 S.Ct. 948, 958-961, L.Ed.2d (1978). Assuming that the expect-

⁶Note statutes on this subject mentioned in footnotes 1 and 2, *supra*.

tations of the appellees were "property" or "liberty" interests entitled to procedural due process protection, an application of the three-part *Mathews v. Eldridge* analysis would demonstrate that the Act meets the procedural requirements of the Due Process Clause. First, the private interest affected by the Board's temporary order is not vital and a temporary deprivation causes no grievous loss. Second, the existing procedure results in no risk of a permanent deprivation, since it is merely a postponement until a full evidentiary hearing and decision, which must be rendered within 90 days of the temporary order. Additional procedural safeguards would be meaningless because the only option would be to have a full hearing, requiring the time consuming assemblage of evidence relevant to the factors listed in Vehicle Code §3063. Any preliminary hearing would be a hurried and error prone affair and present no viable option to the existing procedure. Third, any type of preliminary hearing, given the complexity of the factors listed in Vehicle Code §3063, would be fiscally and administratively burdensome to the Board.

III. THE JUDGMENT OF THE TRIAL COURT SHOULD NOT BE AFFIRMED ON THE BASIS OF AN ARGUMENT, UNCONSIDERED BY THE DISTRICT COURT, THAT THE TERMS OF THE ACT CONFLICT WITH THE FEDERAL ANTITRUST LAWS AND ARE THEREFORE INVALID UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

- A. This Court Need Not Consider, as an Alternative Ground for Affirming the District Court Judgment, the Argument That the Terms of the Act Conflict With the Federal Antitrust Laws and Are Therefore Invalid Under the Supremacy Clause of the United States Constitution.**

Although the appellees argued to the district court that the Act, because it allegedly conflicts with the federal antitrust laws, should be declared invalid under the Supremacy Clause of the Constitution (A. 105, 128-135), the district court specifically refused to consider this claim in its decision. (*Orrin W. Fox Co. v. New Motor Veh. Bd., etc.*, 440 F.Supp. 436, 441 (CD Cal. 1977)) Since the district court did not reach this argument, now pressed by appellees in their Motion to Dismiss, appellants submit that it is within this Court's discretion to decline to consider that argument at this time. While it is true that this issue was briefed before the district court (see A. 105, 128-135), this Court is not able to review the thinking of the district court on this matter. For this reason, appellants submit that this Court should decline to exercise the discretionary right which it possesses to review alternative grounds for affirmance of a judgment. (Cf. *Langnes v. Green*, 282 U.S. 531, 535-539, 51 S.Ct. 214, 75 L.Ed. 520 (1931).) Accordingly the district court summary judgment should either stand

or fall on the basis of the arguments made above in this Brief.⁷

B. The Act and the Action of the Board Relevant to This Appeal Constitute "State Action", and in No Way Conflict With the Federal Antitrust Laws, Therefore the Act Cannot Be Held Invalid Under the Supremacy Clause of the Constitution.

As this Court has recently gone to some pains to establish, the "state action" exemption to the federal antitrust laws applies to the actions of state officials, even if "anticompetitive", as long as those actions are part of a clearly articulated and affirmatively expressed policy adopted by the state in its sovereign capacity in order to displace competition with regulation in a particular industry or business activity. (Cf. *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-363, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) and *City of*

⁷In their Motion to Dismiss, appellees state that they intend to argue before this Court that the Act is unconstitutional because it imposes an alleged "undue burden" on interstate commerce, and therefore conflicts with the Commerce Clause of the Constitution (Article I, section 8, clause 3). This argument was made by automobile manufacturers in the *General GMC Trucks, Inc. v. General Motors Corp.*, *supra*, and *American Motors Sales Corporation v. Division of Motor Vehicles of the Commonwealth of Virginia*, *supra*, decisions discussed above. While an allegation was contained in appellees' Complaint to the effect that the Act constituted an undue burden on interstate commerce (A. 5, 22-23), appellees did not choose to present this issue to the district court in the motion for summary judgment. (A. 104-136) Because the district court never considered this argument, which appellees voluntarily elected to omit from their summary judgment motion, appellants submit that this Court should not consider any "undue burden on interstate commerce" argument in determining this appeal. Such action on the part of this Court would be consistent with its normal policy of not considering issues on appeal which were not presented to the lower court whose judgment is being subjected to review. (*Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967).)

Lafayette, et al. v. Louisiana Power & Light Co., 46 U.S. Law Week 4265, 4270-4271 (1978).)

Assuming, for argument's sake, that Vehicle Code §§3062 and 3063 direct the Board to take "anticompetitive" action, it is clear that the Act is a clearly articulated, affirmative expression of a state policy to substitute the decision of the five public members of the Board for the unilateral decision of an automobile manufacturer on the issue of whether a franchise can be placed in the relevant market area of an existing franchisee carrying the same line-make of automobile. The Act establishes a system of comprehensive regulation of certain automobile manufacturer-dealer relationships through a clear and direct choice of the California State Legislature. Thus the Act and the Board's activities relevant to this action constitute state action and cannot be held invalid due to any asserted "conflict" with the federal antitrust laws under the Supremacy Clause. As this Court has so often stated, such state action must be held valid regardless of any conflict with the federal antitrust laws because of the nature of our federal system of government and the corollary concept of state sovereignty (*Parker v. Brown*, 317 U.S. 338, 351, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and cf. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-791, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Bates v. State Bar of Arizona*, *supra*, 433 U.S. at 360, and *City of Lafayette, et al. v. Louisiana Power & Light Co.*, *supra*, 46 U.S. Law Week at 4271).

Heretofore, appellees have argued that the *Parker v. Brown* state action exemption does not apply to the Act and the Board's activities because in *Parker*, the state action involved was in furtherance of a state policy which was clearly consistent with and in furtherance of an announced federal agricultural policy. However the state action exemption is not based upon a determination of whether or not the state action involved is consistent with or in furtherance of an announced federal policy. Instead, as established above, the state action exemption rests firmly upon the principle of a federal system of government with the necessary auxiliary concept of complete state sovereignty so that the states can perform their proper function under the Reserved Powers Clause of the Tenth Amendment. It is clear, for instance, that the ban on attorney advertising which this Court held valid in *Bates* against a Supremacy Clause challenge was in no way in furtherance of, or consistent with, any federal policy of suppression of the right of advertising by attorneys or any other professional or business group. Absent a problem under the Commerce Clause when a state policy may produce an "undue burden on interstate commerce", a state, acting as a sovereign, is free to use state officials to accomplish an admittedly "anticompetitive" regulatory scheme. As mentioned before, due to the fact that appellees elected not to present any "undue burden" argument to the district court, there is no issue presently before this Court concerning the Act and the Board and their effect, if any, on interstate commerce.

Appellees' argument that sovereign state action must, regardless of effect on interstate commerce, be invalidated if it "conflicts" with the policy of the federal antitrust laws would, if accepted, destroy the ability of states to meaningfully govern commercial activity. Appellees would thus apparently have this Court reinstitute a concept of economic "substantive due process" which would involve the federal judiciary in an unending chore of invalidating public enactments of popularly elected state legislatures.

Appellees have heretofore argued that this Court's decision in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed.2d 1035 (1951) requires a determination that the Act is invalid under the Supremacy Clause. Such an assertion clearly misreads the teaching of the *Schwegmann* case, which was, and is, that a state, by passing a statute, cannot immunize *private* conduct from the application of the federal antitrust laws. *Schwegmann* involved *private* price fixing, with no "state action" involved, such as a regulatory system designed to eliminate or minimize any anticompetitive effect. The Act, on the other hand, establishes a procedure under which the Board, clearly composed of state officials, carry out a comprehensive regulatory system of control over manufacturer-dealer relations, including control, in certain instances, over the ability of a manufacturer to establish a new franchisee in a given location when the Board is convinced that there is good cause for not allowing such action. The crucial distinction between a situation in which state legisla-

tion merely attempts to immunize throughly private anticompetitive activity and a situation in which state legislation directs state officials to comprehensively regulate certain industrial conduct has recently been forcefully noted by this Court. (*Bates v. State Bar of Arizona, supra*, 433 U.S. at 359-363.)

Appellees have also heretofore argued, in their Motion to Dismiss, that the Act clearly conflicts with the federal Automobile Dealers' Day in Court Act (15 U.S.C. §§1221-1225) ("Dealers' Day Act") and should thus be held invalid. However, such an argument must specifically overlook section 5 of the Dealers' Day Act which states:

"This chapter shall not invalidate any provision of the laws of any State except insofar as there is a *direct conflict* between an *expressed provision* of this chapter and an expressed provision of the State law which cannot be reconciled." (15 U.S.C. §1225) (*emphasis added*)

Obviously there is no "direct conflict" between the Dealers' Day Act, which establishes a private right of action for dealers who are injured by bad faith actions on the part of manufacturers, and the California Act, which, among other things, establishes Board review of a decision of a manufacturer to establish a new franchise in certain limited situations. Under the extremely specific test established in §1225, manifestly a clear expression of Congressional policy, the Dealers' Day Act does *not* preempt the California Act.

CONCLUSION

For the reasons specified above, appellants-intervenors submit that this Court should reverse the summary judgment granted by the district court below and remand this action to that court for further proceedings.

Respectfully submitted,

JAMES R. McCALL,

Professor of Law, U. C. Hastings, Of Counsel,

CROW, LYTLE, GILWEE,

DONOGHUE, ADLER & WENINGER,

431 J Street,

Sacramento, California 95814,

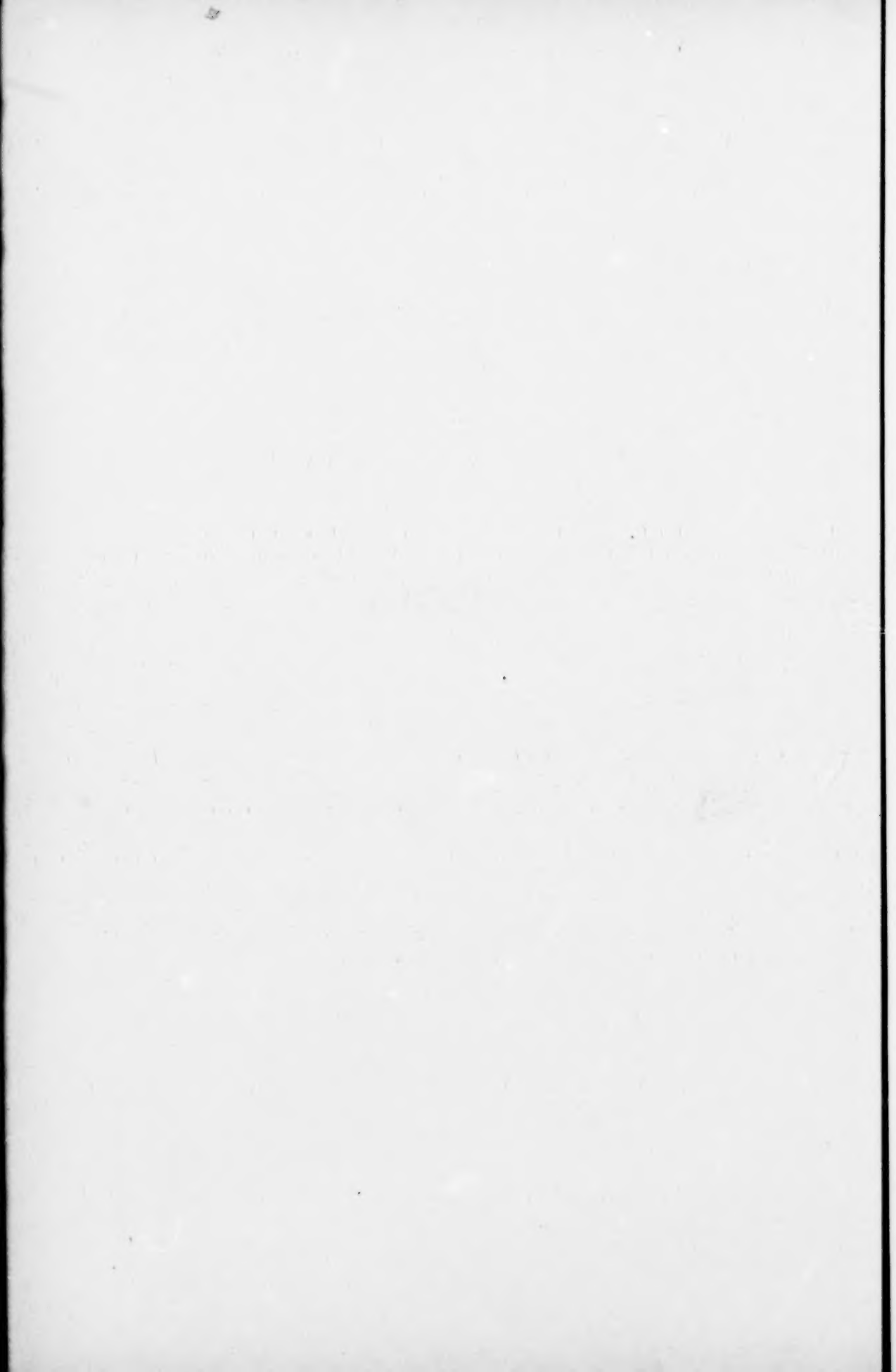
Telephone: (916) 441-2980,

Attorneys for Appellants.

May 1, 1978.

(Appendix Follows)

APPENDIX



Appendix

THE CONSTITUTION OF THE UNITED STATES

Article I:

§ 8. [1] The Congress shall have Power * * *

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes:

* * *

Article VI:

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

Amendment XIV:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE SHERMAN ANTI-TRUST ACT
(15 United States Code §1)

§ 1. Every contract, combination in the form of trust or otherwise, where conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

CALIFORNIA VEHICLE CODE SECTIONS

* * *

§ 507. *Relevant Market Area*

The "relevant market area" is any area within a radius of 10 miles from the site of a potential new dealership.

* * *

§ 3060. *Termination of Franchise*

Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) The franchisee and the board have received written notice from the franchisor as follows:

(1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentations by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. When such a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

The franchisor shall not modify or replace a franchise with a succeeding franchise if such modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor shall have first given the board and each affected franchisee notice thereof at least 60 days in advance of such modification or replacement. Within 30 days of receipt of such notice, a franchisee may file a protest with the board and such modification or replacement shall not become effective until there is a finding by the board that there is good cause for such modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, such prior franchise shall continue in effect until reso-

lution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

§ 3061. *Good Cause*

In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:

- (1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.
- (2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.
- (3) Permanency of the investment.
- (4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.
- (5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.
- (6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee's failure to comply with the terms of the franchise.

§ 3062. *Establishing or Relocating Dealerships*

(a) In the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership within or into a relevant market area where the same line-make is then represented, the franchisor shall in writing first notify the board and each franchisee in such line-make in the relevant market area of his intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 15 days of receiving such notice or within 15 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

(b) With respect to the relocation of an existing dealership, subdivision (a) shall not apply to any relocation which is less than one mile from the existing location of the dealership and which is to a location within the same relevant market area within the same city where the existing dealership is located.

§ 3063. *Good Cause*

In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board should take into consideration the existing circumstances, including, but not limited to:

- (1) Permanency of the investment.
- (2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.
- (3) Whether it is injurious to the public welfare for an additional franchise to be established.
- (4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.
- (5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

* * *

§ 3066. *Hearings on Protests*

(a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notifications by the board of protests and decisions of the board. The board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515, and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

(d) No member of the board who is a new motor vehicle dealer may participate in, deliberate on, hear or consider, or decide, any matter involving a protest filed pursuant to this article.

§ 3067. *Decision*

The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. If the board fails to act within 30 days after such hearing, within 30 days after the board receives a proposed decision where the case is heard before a hearing officer alone, or within such period as may be necessitated by Section 11517 of the Government Code or as may be mutually agreed upon by the parties, then the proposed action shall be deemed to be approved. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail, as well as to all individuals and groups, which have requested notification by the board of protests and decisions by the board. The decision shall be final upon its delivery or mailing and no reconsideration or rehearing shall be permitted.

§ 3068. *Judicial Review*

Either party may seek judicial review of final decisions of the board. Time for filing for such review shall not be more than 45 days from the date on which the final order of the board is made public and is delivered to the parties personally or is sent them by registered mail.

§ 3069. *Application of Article*

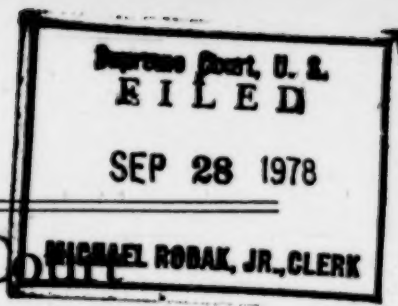
The provisions of this article shall be applicable to all franchises existing between dealers and manufacturers, manufacturer branches, distributors and distributor branches at the time of its enactment and to all such future franchises.

§ 11713.2.

It shall be unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code:

* * *

(1) To modify, replace, enter into, relocate, terminate or refuse to renew a franchise in violation of Article 4 (commencing with Section 3060) of Chapter 6 of Division 2.



In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION
and MOTOR CAR DEALERS ASSOCIATION OF
SOUTHERN CALIFORNIA,
Appellants,

vs.

ORRIN W. FOX Co., a corporation,
MULLER CHEVROLET, a corporation,
and GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court,
Central District of California

REPLY BRIEF FOR APPELLANTS

JAMES R. McCALL

Professor of Law, U. C. Hastings,
Of Counsel

CROW, LYTTLE, GILWEE,

DONOGHUE, ADLER &

WENINGER

431 J Street

Sacramento, California 95814

Telephone: (916) 441-2980

Attorneys for Appellants.



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In the Supreme Court

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OCTOBER TERM, 1978

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION
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MULLER CHEVROLET, a corporation,
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Appellees.

On Appeal from the United States District Court,
Central District of California

REPLY BRIEF FOR APPELLANTS

REPLY TO COUNTERSTATEMENT OF THE CASE

Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California (hereafter "Dealer Appellants") wish to clarify two factual points which are incorrectly stated in the Counterstatement of the Case in the Brief for Appellees.

First, the District Court held that certain provisions of the California Automobile Franchise Act ("Act"), more specifically certain portions of California Vehicle Code § 3062, were, on their face, in violation of the procedural guarantees of the Due Process Clause of the Fourteenth Amendment. (See paragraph 1. of the Partial Summary Judgment of the District Court appearing on page 56 of the Appendices to the Jurisdictional Statement of Appellants New Motor Vehicle Board of the State of California, Department of Motor Vehicles of the State of California and Herman Sillas (hereinafter collectively referred to as "State Appellants").)

The District Court had before it the question of the constitutionality of certain portions of California Vehicle Code § 3062, a section contained in the Act. Those portions provide that an automobile dealer may protest the intended establishment within the dealer's "relevant market area" of a new dealership of the same "line-make" of automobile sold by the existing dealer. The protests are to be made to the California New Motor Vehicle Board ("Board"). Upon receiving a protest, the Board must automatically issue an order prohibiting the manufacturer from establishing the proposed dealership until the Board has held a hearing to determine whether "there is good cause for not permitting such new dealership" to be established.¹

¹The portions of California Vehicle Code § 3062 which provide for a protest by an existing franchisee and the automatic stay order will hereafter usually be referred to as the "establishment protest provisions". The establishment protest provisions apply when an automobile manufacturer seeks to relocate an existing franchise into the relevant market area of an existing franchisee. (See California Vehicle Code § 3062.)

A review of the District Court's Memorandum of Decision (appearing as Appendix A to the Jurisdictional Statement of Dealer Appellants) shows that the lower court was asked to declare the establishment protest provisions to be unconstitutional on their face (see Appendix A, page ii), that the lower court felt that the procedures mandated in the establishment protest provisions were in gross violation of the Due Process Clause (see Appendix A, page viii), that the lower court felt that the establishment protest provisions did not contain certain provisions required by the Due Process Clause (Appendix A, page x) and that the establishment protest provision, standing by itself, was "clearly unconstitutional" (Appendix A, page xiii). Thus, the District Court found the establishment protest provisions to be facially unconstitutional, and the "facts" elaborately discussed in the Counterstatement of the Case in the Brief for Appellees were irrelevant to the District Court's decision.

Second, the Counterstatement of the Case contained in the Brief for Appellees leaves the false impression that the Act contained no time requirements to ensure a prompt hearing and timely decision by the Board, once a dealer had filed a protest under the establishment protest provisions. However, as pointed out in the Brief for [Dealer] Appellants, at page 10, the Board is required by California Vehicle Code § 3066 to hold a hearing within 60 days following the issuance of the temporary order prohibiting a manufacturer from establishing a new dealership. Furthermore, the Board must render its decision within 30 days after holding such a hearing, or receiving a proposed decision from a hearing officer if such an official is used

to take evidence in the case. California Vehicle Code § 3067 also provides that the 30 day time period may be delayed if it is necessary to resubmit the case to a hearing examiner for additional testimony.

ARGUMENT

- I. APPELLEES MAKE NO SERIOUS ARGUMENT THAT THEY ARE ASSERTING INDIVIDUAL INTERESTS WHICH QUALIFY AS EITHER "LIBERTY" OR "PROPERTY" UNDER THE FOURTEENTH AMENDMENT, NOR DO APPELLEES MAKE A SERIOUS ARGUMENT THAT THE PROCEDURES AFFORDED BY THE ACT ARE ANYTHING LESS THAN THAT PROCESS THAT IS DUE THE INTEREST WHICH THE APPELLEES ASSERT.

No serious argument is offered at pages 25 through 34 of the Brief for Appellees that the interests which they assert are deserving of procedural due process protection under this Court's decisions. Appellees Orrin W. Fox Co. and Muller Chevrolet assert the rights to operate an automobile dealership wherever and whenever they wish to do so, and Appellee General Motors Corporation asserts the right to enfranchise any dealer wherever and whenever it chooses to do so. Under no stretch of the imagination could such refined and highly expensive desires and expectations be equated with "the right of the individual . . . to engage in any of the common occupations of life", and yet Appellees consistently quote those phrases from *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) as if the incantation alone was persuasive.

Appellees, at page 27 of their Brief, quote a passage from *Green v. McElroy*, 360 U.S. 474, 492 (1959) in a similar manner. The passage, however, is pure dictum in a decision which specifically turned on the question of

whether Congress authorized the governmental action involved, not whether procedural due process was required in the situation (360 U.S. at 491-492).

The basic argument of State Appellants and Dealer Appellants is that the "right" to open an automobile dealership wherever and whenever the franchisee or franchisor would like to do so is neither a property nor liberty interest under the standards painstakingly set forth by this Court, and the rhetorical flourishes mentioned above do not address that argument. However, on pages 32 and 33 of the Brief for Appellees, an attempt is made to argue that the California Vehicle Code provisions requiring a dealer to hold a license and to maintain a place of business create a "property interest" in Appellees, now infringed by the Act. However, no explanation is given why a requirement that a licensee have a place of business creates an entitlement on the part of the license holder to open that place of business wherever or whenever he or she would like. No such explanation could be plausibly made.

On pages 33 and 34, Appellees offer the propositions that the antitrust laws give a "property" interest to Appellees, and that such an interest is also created by the contracts between the Appellees. It is obvious that the antitrust laws create only an obligation on the part of business entities to engage in fair competition; and those laws neither preempt otherwise valid state laws, nor create entitlements which constitute property interests. The argument that a contract between two private parties, not involving a right guaranteed under a state law, can create a procedural due process protected right is novel, but neither logical nor based on precedent.

At page 29 of their Brief, Appellees state that if the rights which they assert (to franchise, or be franchised as, an automobile dealer in any location whenever they wish) are not protected "liberty" or "property" interests under the Due Process Clause such rights would be "completely outside" the protection of the Fourteenth Amendment, and such a circumstance would be "an unthinkable result." This statement overlooks the obvious point that the Fourteenth Amendment, as well as other provisions in the United States Constitution, *always* protect the citizens of this country from arbitrary or irrational legislation by requiring that statutes be shown to be rationally related to a legitimate end of government. (Cf. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) and Nowak, Rotunda & Young, *Constitutional Law*, 407-410 (1978).)

It is obviously a legitimate purpose for a state government to seek to protect small independent dealers within its state from oppression by distant manufacturers who, through the threat of increasing the number of dealerships in a dealer's area, can cause him or her to accept onerous terms and conditions in the manufacturer-dealer relationship. It is also obviously a legitimate purpose for state government to seek to provide a rational process to ensure that a manufacturer's decision to establish a new dealership will not overload a particular market area, thereby driving existing dealers of that manufacturer into bankruptcy. Manufacturer overloading can have devastating effects on local economies if it causes bankruptcies and will often force dealers to cut back in service and repair facilities, in order to conserve assets to avoid business failure.

The establishment protest provisions of the Act provide for an independent appraisal by a state agency of whether it will be detrimental to the public interest for a manufacturer to place a new dealership in a particular marketing area. The factors which must be considered by the Board in making this appraisal are set out in Vehicle Code § 3063, and reflect the Legislature's concern with the issues of dealer failure, the effect on warranty service and repair availability for consumers, fairness to dealers involved and the adequacy of automobile sales competition in the localities impacted by the manufacturer's decision.² The legislatures in eighteen states have similarly passed laws prescribing conditions, and often review procedures, under which new or additional automobile dealerships may be permitted in a marketing area already served by an existing dealer carrying the same line-make of automobile.³

²California Vehicle Code § 3063 provides as follows:

In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board should take into consideration the existing circumstances, including, but not limited to:

- (1) Permanency of the investment.
- (2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.
- (3) Whether it is injurious to the public welfare for an additional franchise to be established.
- (4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.
- (5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

³States with statutes prescribing conditions under which new or additional retail automobile franchises are permitted in the territory of an existing franchised dealer include: Arizona (Arizona Revised

The state legislation mentioned above follows the determinations made by Congress when it passed the Automobile Dealers' Day in Court Act in 1956.⁴ Congressional reports and studies at that time vividly demonstrated the need for legislation to protect independent automobile dealers from abuse at the hands of giant manufacturers.⁵

Statutes 28-1304.02); California (California Vehicle Code 3062, 3063); Colorado (Colorado Revised Statutes 13-11-20); Florida (Florida Statutes Section 320-642); Georgia (Georgia Code Section 84-6610(f)(10)); Hawaii (Hawaii Revised Statutes 437-28(a)(22)(b)); Iowa (Iowa Code Annotated Section 322A.4); Massachusetts (Annotated Laws of Massachusetts 93B Section 4(3)(1)); Nebraska (Revised Statutes of Nebraska Section 60-1422); New Hampshire (New Hampshire Revised Statutes Annotated Section 357-B, Section 4(III)(1)); New Mexico (New Mexico Statutes Annotated Chapter 6 (Laws of 1973)); North Carolina (North Carolina General Statutes Section 20-305(5)); Rhode Island (Rhode Island Statutes Section 31-5.1-4(c)(11)); South Dakota (South Dakota Codified Laws Section 32-6A-3, 4); Tennessee (Tennessee Code Annotated Chapter 17 Section 59-1714(j)); Vermont (Vermont Statutes Annotated Title 9 Chapter 107 Section 4074(c)(9)); Virginia (Virginia Code Annotated Section 46.1-547(d)); Wisconsin (Wisconsin Statutes Annotated Section 218.01(3)(f)); and West Virginia (West Virginia Code Volume 14 Section 47-17-5(i)).

⁴15 U.S.C. §§ 1221-1225.

⁵For example, hearings disclosed that:

"To the manufacturers the dealership is a sales outlet to be judged solely on its efficiency in furthering the manufacturer's interests. He demands the right to increase, decrease or substitute sales outlets as he deems necessary. The dealer regards himself as an independent businessman and his franchise as a property right, the loss of which will cause him damage. This conflict in interest is between parties of totally unequal economic power. As a result, the manufacturer has been able to determine arbitrarily the rules by which the two parties conduct their business affairs. The rules are incorporated in the sales agreement which the manufacturer has prepared for the dealer's signature. A Study of the Antitrust Laws, Staff Reports on the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary 84th Cong., 2d Sess. 13 (1956).

It was determined that the existence of such imbalance was undesirable and placed too much economic power in the hands of a few:

"The plight of the dealers is a notable example of the effects of too great concentration of economic power in the hands of a

The concluding section of the Automobile Dealers' Day in Court Act virtually invited state legislation on this matter by removing any possibility of implied preemption.⁹

The states have almost unanimously responded by passing statutes which protect automobile dealers from arbi-

few corporation managers. A single decision by the president of General Motors may vitally affect the business of over 18,000 small business men in every city, town and village in the country. The corporation directs almost every action of the dealer, as though he were an agent or employee, but lets him bear all the burdens and risks entailed by so-called independents." *Id.* at 13.

As to the prevalence of the problem in the industry at large, it was found that "the problems of the General Motors dealers under the franchise are, in the main, common to all dealers in the industry." Senate Report at 14.

As a result, it was recommended that "legislation is needed to equalize the balance of power now heavily weighted in the manufacturer's favor." Senate Report at 14.

A parallel study reached an almost identical conclusion:

"Concentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is required to remedy the manifest disparity in the ability of franchised dealers of automotive vehicles to bargain with their manufacturers. Investigations of the automobile industry, moreover, demonstrate a continuing trend toward greater concentration, as well as abuse by the manufacturers of their dominant position with respect to their dealers. These investigations have disclosed practices and conditions which require new legislative methods and a change in established concepts." H. Rep. No. 2850, Report on Automobile Dealer Franchises, 84th Cong., 2d Sess. 3 (1956).

In recommending legislation designed to remedy the dealers disparate bargaining position, the importance of automobile dealers to the public was emphasized:

"While the individual automobile dealer may be classified as a small-businessman, collectively the automobile-dealer group is of great importance to the economy. Franchised automobile dealers have a total investment in their businesses in the amount of more than \$5 billion and employ approximately 668,000 persons. *Id.* at 3-4

⁹15 U.S.C. § 1225 provides:

This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled.

trary and unreasonable cancellation of franchises without due cause, as well as by passing establishment protest provisions similar to those contained in the California Act.⁷ Such state legislation has consistently been found both justified by the police power reserved to the states and rationally related to legitimate state ends. (See, e.g., *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N.W.2d 420, 427 (Wis. 1955), *Ford Motor Co. v. Pace*, 206 Tenn. 559, 335 S.W.2d 360, 369 (Tenn. 1960).

A Virginia statute, for all practical purposes identical to the establishment protest provisions in the California Act was held to be rationally based and in pursuit of a legitimate state legislative goal in *American Motors Sales Corporation v. Department of Motor Vehicles*, 445 F.Supp.

⁷The states listed in footnote 3 have statutes protecting dealers from arbitrary franchise cancellations. In addition, the following states have comparable laws on the subject: Arkansas (Arkansas Statutes Section 75-1501 et seq. (defeated at referendum, Nov. 6, 1962); Section 75-160 et seq. (Acts 1949, No. 142, amended 1959)); Connecticut (Connecticut General Statutes Section 14-51 et seq.); Idaho (Idaho Code Section 49-135 et seq.); Kansas (Kansas Statutes Annotated Section 8-126 et seq.); Kentucky (Kentucky Revised Statutes Section 190.010 et seq.); Maine (Revised Statutes of Maine Annotated Chapter 29, Section 1 et seq.); Maryland (Annotated Code of Maryland Article 66½ Section 61 et seq.); Minnesota (Minnesota Statutes Annotated Section 168.27 et seq.); Mississippi (Mississippi Code Annotated Section 8071.3); New Jersey (New Jersey Statutes Annotated Section 39:10-1 et seq.); New York (McKinney's Consolidated Laws of New York Annotated, General Business Law Section 195 et seq., Vehicle and Traffic Law Section 415 et seq.); North Dakota (North Dakota Century Code Section 39-22-01 et seq., Section 51-07-01 et seq.); Ohio (Page's Ohio Revised Code Annotated Section 4517.01 et seq.); Oklahoma (Oklahoma Statutes Annotated Title 47 Section 22.15a, Title 47 Section 561 et seq.); Pennsylvania (Purdon's Pennsylvania Statutes Annotated Title 75 Section 409, Title 69 Section 601 et seq., Title 63 Section 801 et seq.); South Carolina (Code of Laws of South Carolina Section 46-91 et seq.) and Texas (Vernon's Texas Civil Statutes, Cities, Towns and Villages Article 1015e, State Highways Article 6686).

902 (E.D.Va. 1978). In *American Motors Sales*, *supra*, the District Court stated:

Defendants assert that § 46.1-547(d) is supported by the legitimate state interest of protecting small independent automobile dealers from unfair and abusive treatment by the giant automobile manufacturers. The Court is in full agreement that this is a 'legitimate local purpose' under the Commerce Clause. The abuses occasioned by the vast disparity in bargaining power between individual motor vehicle franchises and the megacorporations which manufacture and distribute motor vehicles are well documented in the legislative history of the Federal Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225. [*citations*] Even counsel for American acknowledged in his opening statement at the DMV hearing that it would be an unfair trade practice for a manufacturer to establish so many dealerships in a trade area that it would be a foregone conclusion that not all the dealers would be able to meet the minimum sales requirements specified in their contracts. [footnote omitted] As counsel for American realized, such deliberate overloading would give the manufacturer power under the terms of the standard franchise agreement to "start terminating willy-nilly." The State undoubtedly has authority to combat such a practice. (445 F.Supp. at 907)*

It is clear that Appellees have no case under the proper conception of the Due Process Clause. It is also clear that the Appellees are actually arguing for a return to a "substantive due process" jurisprudence in economic matters. The attempt to strain the Due Process Clause to accom-

*In *American Motors Sales*, the District Court, for invalid reasons not connected with the Due Process Clause, held the Virginia statute invalid. The decision is discussed in connection with the Commerce Clause argument of Appellees, *infra*.

plish a return to a substantive due process jurisprudence should be rejected.

II. THE TERMS OF THE ACT DO NOT CONFLICT WITH THE FEDERAL ANTITRUST LAWS AND ARE THEREFORE NOT INVALID UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

If this Court chooses to consider the Supremacy Clause argument of Appellees (Brief for Appellees, pages 41-53), the argument must be rejected as an alternative ground for affirming the District Court Judgment. The only feature of the establishment protest provision which is not clearly an act of the State of California is the exercise of the power to protest to the Board, that the Act gives to an existing dealer under Vehicle Code § 3062. As Dealer Appellants point out in subargument A, the right of dealer protest created in the establishment protest provisions is clearly activity which is immune from the Sherman Act because it constitutes the exercise of the right to petition the government, and thus is protected by the First Amendment to the United States Constitution. Subargument A also establishes that even if the dealer protest provisions did not create a constitutionally protected right to petition the government, such a dealer protest directed to the only private party in a position to stop the establishment of a new franchise (the franchisor-manufacturer) would not violate the antitrust laws. Subargument B establishes that even if the private conduct authorized by the establishment protest provisions would violate the Sherman Act but for the Act, the state action immunity doctrine would still apply to the authorized private conduct and thereby immunize it from the Sherman Act.

- A. The Private Conduct Authorized by the Establishment Protest Provisions of the Act does not Violate the Antitrust Laws, Because it Constitutes an Exercise of the Right to Petition the Government, or, Alternatively, is Conduct Which is "Per Se" Legal Under the Sherman Act.**

Appellees argue that the establishment protest provisions of the Act, including both the creation of a right in a dealer to protest and the mandate to the Board to issue an automatic stay order, violate the Sherman Act. (Brief for Appellees, pages 41-53.) However, it is clear that automatic issuance of a stay by the Board is the act of a state agency clearly authorized, and even compelled, by a statute passed by the California Legislature. Thus, beyond question, it is immune from the application of the Sherman Act under the "state action" doctrine. (*Parker v. Brown*, 317 U.S. 341 (1945), *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and see Areeda & Turner, *Antitrust Law*, Volume I, 71-92 (1978) [Hereafter references to volume I of the treatise of Professors Areeda and Turner will take the form of a citation to "AREEDA," with the proper page number(s) inserted.]

The only portion of the dealer establishment provisions, therefore, which are even arguably subject to attack under the Sherman Act is the creation, by the Legislature of the State of California, of a right exercisable by appropriate automobile dealers, to protest the establishment of franchises in their individual relevant markets. (See Vehicle Code § 3062.) But the right of a dealer to protest to a state agency is clearly immune from any application of the Sherman Act under the implied exclusion from the antitrust laws that immunizes all citizens attempting to

contact and influence their government. (*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965)). This exemption is based on two grounds. First is the necessity to maintain free, open and unthreatened communications between the public and its lawmakers and officials, a process which is vital to the functioning of a representative democracy. Second, "and of at least equal significance," is that a contrary decision would be a threat to the constitutionally protected right of petition found in the First Amendment. (*Eastern Railroad Presidents Conference v. Noerr*, *supra*, 365 U.S. at 137-138.) This exception to the application of the antitrust laws is often called the "political action" or "*Noerr-Pennington*" exception, and it expressly applies to protests to administrative agencies. (*California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); and see AREEDA, 36-41.)

In the Act, the specific method by which a dealer may protest, and the framework by which the Board shall consider that protest are established. (See Vehicle Code §§ 3062, 3063, 3066 and 3067.) Surely the First Amendment right to petition would be gravely impaired if the antitrust laws were held to apply to the exercise by a citizen of a legislatively created right to protest and thereby petition an administrative body.

While in certain narrowly defined situations the antitrust laws might be brought to bear upon, and apply to, a private protest or petition to a legislative body or executive or administrative agency under what is known as the "sham exception" to the political action exception, such

an exemption must operate on a case by case basis. It must be based upon a finding that a particular protestant, in a particular instance, did not intend to protest to the government, or to influence government action, but instead was pursuing some ulterior purpose.⁹

While the sham exception might apply to a fact situation in an individual case, it could never form the basis for holding that the right to protest or petition, as established by the legislative enactment of a state, conflicted with one of the antitrust laws, and was therefore invalid under the Supremacy Clause. It should be noted that the right of protest involved in *California Motor Transport* was very similar to the right of protest created in the Act, and this Court, while acknowledging the sham exception, clearly was one of the opinion that the *statute* there involved was valid.

While it is clear that the political action exception from the antitrust laws shields private conduct undertaken pursuant to the establishment protest provision, there would be no antitrust violation in any event in a situation in which a single firm, not pursuant to a collective agreement, protests the establishment of a new dealership or franchise to the franchisor, the only other entity besides a governmental body which could prevent the establishment of a new franchise. The establishment protest provisions authorize *only* unilateral action, in the form of a single dealer, to lodge a protest. Beyond argument, cases interpreting the Sherman Act are quite clear on the point that dealers have

⁹The sham exception principle was mentioned by this Court in *Noerr, supra*, 365 U.S. at 144, and also in *California Motor Transport, supra*, 404 U.S. at 512.

a right to unilaterally protest the establishment of a new dealership by a manufacturer, and agreements by manufacturer giving an exclusive dealership to an existing dealer are considered "per se legal" under § 1 of the Sherman Act.¹⁰

Leaving aside the question of whether the private conduct authorized by the establishment protest provisions constitutes "state action", it is clear that there can be no preemption of a state statute by the Sherman Act unless the private conduct it authorizes violates the Sherman Act. Thus there can be no application of the preemption doctrine to the establishment protest provisions, because the only conduct by private parties which is authorized under that provision is specifically immunized from application of the Sherman Act under the political action doctrine, and, even if no petition to the government were involved, the private conduct authorized by the provision would not violate the Sherman Act.¹¹

¹⁰See *Packard Motor Car Co. v. Webster Motor Car Co.* (D.C. Cir. 1957) 243 F.2d 418, 420, *cert. denied* 355 U.S. 822 (1957). While it is conceivable that an exclusive dealership might raise problems under § 2 of the Sherman Act, it is interesting to note that if such a monopolization situation developed, the Board virtually would be required, under the criteria established for passing upon the validity of a dealer protest, to deny any dealer protest which served to maintain or establish a monopoly. (See California Vehicle Code § 3063(5).)

¹¹The private conduct authorized by the dealer protest provisions is thus quite different from all of this Court's state action exemption cases involving activity of private parties undertaken pursuant to a state statute. In all of the cases of that type decided by this Court, the activities of the private parties would clearly have been *per se* illegal under the antitrust laws but for the existence of a particular state statute. [See *Parker v. Brown*, *supra*, involving market allocation and price fixing, which was held legal under the state action exemption; *Goldfarb v. Virginia Bar* 421 U.S. 773 (1975), involving price fixing which was held to be outside the scope of the exemption and thus illegal; *Cantor v. Detroit Edison Co.* 428 U.S. 579

Appellees make no tenable argument that the private conduct authorized by the Act would be held to violate the Sherman Act, but for the existence of the Act. Appellees' arguments on this point are contained at pages 41-47 of the Brief for Appellees, wherein a claim is made that the creation of a right of an individual dealer to protest the establishment of a new franchise constitutes a form of collective horizontal market allocation (Brief for Appellees, page 42). Such an argument totally overlooks the fact that the establishment protest authorized in the Act is a *unilateral* protest by a single firm.

Appellees further claim that the establishment protest provisions are somehow *per se* illegal by analogy to the vertical price fixing involved in *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) and *Rice v. Alcoholic Beverage Control Board*, 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978). (Brief for Appellees, pages 43-47.) These two decisions hold that vertical price fixing activities unsupervised by any state agency are not shielded by the state action exemption. But the case at bar involves an Act authorizing a single firm to protest to a state agency that actively supervises the administration of the Act. If either *Schwegmann* or *Rice* have any

(1976), involving tie-in selling, which was held to be outside the scope of the state action exemption; *Bates v. Arizona State Bar*, *supra*, involving horizontal restrictions on advertising, which were held to be protected by the state action exemption; and *City of Lafayette v. Louisiana Power & Light Co.*, 98 S.Ct. 1123 (1978), involving monopolistic practices on the part of a city which were held to be outside the state action exemption. Also note *Rice v. Alcoholic Beverage Control Board*, 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978), involving vertical price fixing, which was held by the California Supreme Court to be outside the scope of the state action exemption.]

relevance to this litigation, it is nowhere explained by Appellees.

B. The Private Conduct Authorized By the Establishment Protest Provision Constitutes "State Action", and Would, In Any Event, Thus Be Exempt From the Application of the Antitrust Laws.

Dealer Appellants have previously argued that the activities of both the Board and dealers mandated and authorized by the establishment protest provisions are shielded from the application of the Sherman Act by the second major implied exception to the antitrust laws, the state action doctrine. (See Brief for Appellants, pages 19-23.)

Appellees argue that if the right of dealers to protest created in the establishment protest provision is illegal under the Sherman Act, it is not shielded by the state action doctrine of *Parker v. Brown, supra*, because the decision of a dealer to protest, and thereby initiate action on the part of the Board, is not supervised by the Board (see Brief for Appellees, pages 48-53). Actually, Appellees seem to argue that the private conduct authorized by the establishment protest provision includes not only the right of a dealer to protest, but also the issuance of the automatic stay by the Board. However, as mentioned above, even Appellees must concede that when a state agency, such as the Board, is compelled to act by an express mandate by the State Legislature there is no doubt that such activity constitutes state action and is exempted from the antitrust laws. Thus the only logical way to frame Appellees' argument is that if a dealer protest is illegal under the Sherman Act, then that dealer protest is private conduct which does

not constitute "state action" for purposes of that exemption.

While some private conduct allegedly undertaken pursuant to a state statute has been held to be outside the state action exemption, it is clear that a dealer protest as established in the establishment protest provisions would be protected by the state action exemption *even if* the activity of protesting could be considered to be in violation of the Sherman Act. As this Court has made quite clear, where (1) private conduct is clearly authorized by a state statute, (2) that shows the clear intent on the part of the state legislature to displace competition (and the operation of the antitrust laws) in the operation of an industry and (3) there is adequate state supervision and final control over the permanent operation and effects of the private conduct, the private conduct in question will be considered to be "state action" and therefore immune from the federal antitrust laws. (See *Parker v. Brown*, *supra*; *Bates v. Arizona State Bar*, *supra*, 433 U.S. at 359-363; and see AREEDA, 77-92.) All of this Court's state action decisions are consistent with this three part test.¹²

¹²In *Parker v. Brown*, *supra*, the production quota setting, although initiated upon request of private parties, was subject to governmental regulation and was clearly an activity specifically authorized by the state legislature. Under these facts this Court held the state action exemption applied. In *Goldfarb v. Virginia State Bar*, *supra*, the price fixing activity was not supervised by a state agency and was not clearly authorized by a state statute. Accordingly, this Court held that the private conduct was not "state action" for purposes of claiming immunity. In *Cantor v. Detroit Edison*, *supra*, the tie-in sales activity was not specifically authorized by a state statute and the amount of state control and regulation of the tie-in selling activity was minimal. In *Bates v. Arizona State Bar*, *supra*, the private activity of suppressing advertising was held to be protected by the state action doctrine

Applying the three-part test to the private conduct authorized by the establishment protest provisions, it is clearly seen that the private conduct qualifies as state action. First, dealer protests are clearly authorized by the provision. Second, the provision and the Act in question clearly show a legislative intent to displace "competition," and the application of the antitrust laws, from this particular operation in the automobile distribution industry, and substitute state regulation. Third, the state, acting through the Board, provides adequate state supervision and final control of the operation and permanent effects of the private conduct.

Only the third point requires any additional comment for clarity. The Board, of course, controls the question of whether or not the establishment of any new dealership will be permanently enjoined; and the Board controls the length of time during which any temporary injunction can be in effect, since the injunction must end when the Board has reached its decision. Thus the Board acts in a way which is very similar to the operation of the Arizona Supreme Court as discussed in *Bates v. Arizona State Bar* decision. In *Bates*, private parties (local bar association

because it was clearly and specifically authorized by a state agency and a state agency retained control and supervision over the private parties engaged in suppression of advertising. In *City of Lafayette v. Louisiana Power & Light, supra*, a city was held to be the equivalent of a private person for purposes of the state action exemption and, due to the fact that a clear legislative authorization was not available for the alleged monopolistic conduct, the city was unable to claim the state action exemption. In addition, note *Rice v. Alcoholic Beverage Control Board* (1978) 21 Cal.3d 431, in which the private vertical price fixing activity was held to be outside the state action immunity because, even though a state statute specifically authorized the activity involved, the state exercised no control or regulation of the anticompetitive activity (see 21 Cal.3d at 445).

officials) initiated any action to suspend or disbar an attorney from practice because of advertising activities. However a disbarred or suspended attorney had a right of appeal to the Arizona Supreme Court, a state agency, which thus had final control and supervision over the private conduct of local bar officials. This Court held that such supervision, as well as the clear authorization for the private conduct and the clearly shown intent of a state agency to prohibit advertising, meant that the advertising prohibition rule in question, and its enforcement, were immune from the application of the antitrust laws, even though vulnerable under the First Amendment.

Although this Court has not heretofore directly addressed the status of private conduct which merely initiates or triggers formal state action, it clearly viewed such initiating conduct on the part of private parties to be state action in both *Bates v. Arizona State Bar, supra*, and *Parker v. Brown, supra*.¹³ Commentators have taken the position that the fact that under a legislative scheme a private party initiates the state action in question does not make the state supervision inadequate for purposes of the state action immunity. (AREEDA, 77 and 92-97) Such a position is not only consistent with, but is compelled by this Court's decisions. It is also supported by the sound policy consideration that private initiation or protesting to a state action is a useful device by which the government can efficiently and expeditiously rely upon private parties to

¹³In *Bates*, as mentioned *supra*, private parties initially brought suspension or disbarment proceedings against lawyers violating the ban on advertising. In *Parker*, private parties initiated and formulated the production allocation plans, and had to approve such plans before California could adopt them.

bring to official attention those situations which require formal action of the state. As acknowledged in the political action exception to the antitrust laws, the need of government for information is crucial. This need for information compels the conclusion that a statute authorizing a private party to initiate state action does not thereby establish that state supervision is inadequate for the purpose of the state action exception.¹⁴

Raising what appears to be a closely related issue, Appellees have argued that private conduct cannot be deemed state action unless it is *compelled* by the state, and that mere state authorization for the conduct is insufficient. But this position overlooks the *Parker v. Brown* decision itself (where the raisin growers were not compelled to initiate allocation plans, but were merely authorized to do so). The fact that a state law compels certain private conduct, is only significant insofar as it shows a clear intent on the part of the state legislature to displace competition in the operation of an industry. However if such an intent is clearly shown by other features of the statute, the fact that law authorizes, rather than compels, the private conduct is irrelevant. (AREEDA, 92-97)

Finally, it should be noted that distinguished commentators have voiced the obviously valid thought that there are other prohibitions contained in the United States Constitution which are far better suited for attacking

¹⁴Of course, as discussed *supra*, it is Dealer Appellants' position that the political action exception applies to the right of dealer protest created by the establishment protest provisions. Those provisions therefore could never be held to be in violation of the anti-trust laws, regardless of whether the state action immunity would be applicable to dealer protest activities.

so-called "anticompetitive laws" than is the Supremacy Clause when linked with the Sherman Act.¹⁵ (AREEDA, 131-133) This Court is clearly in agreement with this proposition, as evidenced by its statement that "... [A]n adverse effect on competition [is not], in and of itself enough to render a state statute invalid ..." by reason of a conflict with "the central policy of the Sherman Act", (*Exxon v. Governor of Maryland*, 98 S.Ct. 2207, 2218 (1978)). Were this Court to take a contrary position, it is hard to see how states could perform their traditional functions of regulating economic activity under the police power reserved to them by the Tenth Amendment.

III. THE DISTRICT COURT JUDGMENT SHOULD NOT BE AFFIRMED ON THE GROUND THAT THE ESTABLISHMENT PROTEST PROVISION IN THE ACT VIOLATES THE COMMERCE CLAUSE.

Appellees argue, by way of footnotes, that the establishment protest provisions in the Act are unconstitutional because of an alleged conflict with the Commerce Clause. (Brief for Appellees, footnote on page 3 and footnote 40 on pages 53-55.) As this Court may wish to consider this point, Dealer Appellants will respond to Appellees' elab-

¹⁵Such other constitutional prohibitions, of course, include the Due Process Clause and the Commerce Clause. While the prohibitions flowing from either might strike down a state "anticompetitive" law in a particular instance, neither support Appellees' contention that the California Act herein involved is unconstitutional. (See Due Process Clause discussion *supra* and Commerce Clause discussion *infra*.) In footnote 36 on page 44 of Brief for Appellees it is implied, although not directly argued, that the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225, preempts the California Act under the Supremacy Clause. However, as Dealer Appellants have already pointed out, § 1225 of that statute specifically contradicts this argument. (See Brief for Appellants, page 23.)

orate footnote by a brief discussion establishing that this Court's recent decision in *Exxon Corporation v. Governor of Maryland*, *supra*, convincingly answers Appellees' contentions.

The *Exxon* decision establishes the proper framework of analysis for a consideration of whether a state statute affecting manufacturer-dealer relationships, such as the establishment protest provisions, violates the Commerce Clause. *Exxon* also demonstrates that the method of analysis and result reached by the District Court in *American Motor Sales Corp. v. Department of Motor Vehicles*, 445 F.Supp. 902 (E.D. Va. 1978), upon which Appellees so heavily rely, was clearly misconceived and erroneous.

In *American Motor Sales*, a challenge was made by American to a provision in the statutes of the State of Virginia which was similar to the establishment protest provisions in the Act now before this Court. The District Court held that the Virginia statute violated the Commerce Clause because, in the opinion of the judge, the Virginia statute was not the *least* burdensome legislative scheme that the Virginia State Legislature could have devised to meet the problem posed by manufacturers overloading a relevant trade area with excessive dealerships (see 445 F. Supp. at 911). The District Court clearly chose to sit as a "super legislature" and evaluate the wisdom of the Virginia Legislature in choosing between alternative statutes which it might have passed. To arrive at this position, the District Court, on the basis of no empirical evidence, found that "because the challenged statute restricts the sale of automobiles at certain locations, it affects interstate commerce." (see 445 F.Supp. at 905) The Court proceeded to

engage in a balancing analysis by weighing the local benefits produced by the Virginia statute against the severity of the assumed "burden" imposed upon interstate commerce. Eventually, the court was led to a final determination of whether, given the assumed fact that a burden had been imposed on interstate commerce by the statute, there was a less burdensome alternative that the Virginia Legislature might have chosen. The court then found that there was a less burdensome alternative statutory scheme which the Virginia Legislature might have adopted. Therefore the Virginia statute was struck down as being in violation of the Commerce Clause.

While the less burdensome alternative analysis, or the super legislature approach, might be arguably justified on the basis of statements made by this Court, taken out of the relevant factual context of its decisions, it is clear that *Exxon*, decided three months after *American Motor Sales*, flatly rejects such a balancing, or less restrictive alternative, analysis, except on a showing of either discrimination against interstate commerce effected by the state statute involved, or a clearly demonstrated significant restriction on the flow of interstate commerce effected by the statute.

In *Exxon* this Court considered a Commerce Clause attack on a Maryland statute which prohibited producers or refiners of petroleum products from operating retail service stations within that state. This Court first established that there is no possible violation of the Commerce Clause unless the state statute involved either discriminates against interstate sellers, or a factual showing is made

that the statute will cause actual substantial impediment to the flow of interstate commerce.

The California Act before the court in this case treats all automobile manufacturers, whether they be located in California, a sister state or a foreign nation, in the same evenhanded manner. All such manufacturers must give notice of the intent to establish a new automobile franchise to appropriate dealers, and obey the orders of the Board. This evenhanded approach is exactly the same as the non-discriminatory treatment afforded by the Maryland statute to all petroleum producers or refiners, whether in-state Maryland corporations or not. (See 98 S.Ct. at 2214.) Thus the California Act does not discriminate against interstate commerce, and no factual finding of discrimination can be made as the necessary premise to support a less burdensome alternative balancing analysis.

Nor can a less burdensome alternative balancing analysis be based upon any factual finding that the California Act imposes an actual substantial impediment to the flow of interstate commerce in automobiles into the state. The discussion by this Court in *Exxon* establishes this conclusion beyond argument. In *Exxon*, this Court noted that the prohibition against retail operations on the part of producers or refiners would cause them to close down a number of company-operated stations. However this was no reason to assume that the flow of interstate commerce would be substantially impeded, or, in the words of the court, that the share of the petroleum products market in the State of Maryland held by such producers would not be replaced by other refiners (see 98 S.Ct. at 2214). Pursuing the point, this Court made it clear that the Commerce

Clause protects the flow of interstate commerce and does not protect "... the particular structure or methods of operation in a retail market." (98 S.Ct. at 2215)

With citations to *Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794, 806 (1976) and *Breard v. Alexandria*, 341 U.S. 622 (1951), this Court further stated:

"... [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce." (98 S.Ct. at 2215.)

The *Exxon* decision completely answers any argument the California Act violates the Commerce Clause. Any "effect" which the Act might have on the interstate shipment of automobiles into California is total conjectural—a subject on which no factual findings were made by the District Court. It would also appear to be clear that any conceivable effect on the flow of interstate commerce in automobiles caused by the Act will be less than the effect on such commerce produced by the outright prohibition of retail operations mandated by the Maryland statute.

Appellee General Motors is herein merely complaining that it is not able to establish new dealerships at its total and unfettered discretion. It can point to no substantial lessening of the flow of automobiles into California which has been caused by the Act. Aside from the point that there has been no factual inquiry at this point in the litigation on that subject, it is safe to assume that no such show-

ing can be made, because there has been no such lessening of the flow of automobiles into California. To paraphrase this Court's decision in *Exxon*: it is the flow of interstate commerce which the Commerce Clause protects, and not any particular retail market structure or the preferred methods of operation or other predilections of a given manufacturer or retailer. Since neither of the alternative preconditions that must be satisfied before a less burdensome alternative balancing analysis is warranted has been met, the Commerce Clause issue is resolved.

Where no discrimination against out-of-state firms is involved, it is clearly correct to require a party attacking a state statute on Commerce Clause grounds to make a factual showing that the flow of interstate commerce has been substantially impeded, before a less burdensome alternative balancing analysis is proper. No court should self-constitute itself as a super legislature in economic matters absent a clear and demonstrated necessity. While a balancing of less burdensome alternatives was appropriate in the cases in which this Court has engaged in the practice, the facts in those cases showed either discrimination or actual substantial impediment to the flow of interstate commerce.¹⁶

¹⁶See *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977), discrimination was effected by a North Carolina statute that required out-of-state apple sellers to alter their grading systems at great expense to comply with North Carolina grading requirements; *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976), an actual substantial impediment resulted from a Mississippi statute forbidding an out-of-state firm from selling milk in Mississippi unless the out-of-state firm's state had signed a reciprocity agreement accepting the sale within its borders of Mississippi milk; *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), an actual substantial impediment resulted from an Arizona statute requiring that cantaloupe grown in Arizona be shipped out-of-state in crates inspected in Arizona, thus requiring an Arizona grower with a Cal-

The proposition that a less restrictive alternative balancing analysis is proper upon the finding of a theoretical burden on interstate commerce (which amounts to little more than an assumed fact) was wisely rejected by a convincing vote of 7 to 1 by the Court in *Exxon*. Appellees would have this Court resurrect this rejected notion, and apply it in this case in the same manner as the District Court in the *American Motor Sales* case.

Appellees apparently resurrect the notion that automobile sales are a "national industry" and "therefore [its] problems . . . should be addressed by Congress". (Brief for Appellees, page 55.) The notion that the existence of a "nationwide" market in a product, by that fact alone, somehow eliminates any power of the states to regulate any aspect of the retail distribution of the product was convincingly rejected by this Court in *Exxon*. (See 98 S.Ct. at 2215.)

Finally, Appellees imply that a statement in a House Committee Report on the subject of automobile dealer franchises somehow "preempts" California from passing legislation dealing with automobile-dealer relations. (See reference to House Committee on the Judiciary, Report on Automobile Dealer Franchises, H.R. Rep. No. 2850, 84th Cong., 2d Sess. 3 (1956), in footnote 43 on page 55 of the Brief for Appellees.) Of course, only federal *statutes* preempt state legislation, and the Automobile Dealers' Day

ifornia packing plant to spend nearly \$200,000 to build a packing plant in Arizona; and *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), discrimination resulted from a Madison, Wisconsin ordinance prohibiting the sale in Madison of milk pasteurized and bottled at a plant further than five miles from the center of the city, thus effectively preventing the sale in Madison of out-of-state wholesome milk.

in Court Act, a legislative product of the Congressional process of which the House Committee Report was a part, contains a specific section, codified as 15 U.S.C. § 1225, which expressly precludes preemption except insofar as a direct conflict exists between express provisions of the Dealers' Day in Court Act and any state legislation.

IV. THIS COURT SHOULD NOT REVERSE THE DISTRICT COURT ON THE GROUND THAT THAT COURT SHOULD HAVE ABSTAINED FROM RULING ON THE CONSTITUTIONAL ISSUES BEFORE IT.

Dealer Appellants agree with Appellees that, at this point in time, this Court should not reverse the District Court on the ground that that court committed error in refusing to abstain from determining the constitutional issues before it. The question of whether a federal court should abstain from determining an issue on constitutional grounds on the basis of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) is a different and distinguishable question from whether or not abstention from determining such issues is required by the doctrine announced by this Court in *Younger v. Harris*, 401 U.S. 37 (1971). (*Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 477 (1977).)

Since the question of whether the District Court erred by not abstaining on the basis of the *Younger* doctrine was not raised by either the Dealer Appellants or the State Appellants in their respective jurisdictional statements, the issue is not properly before this Court under Rule 40 (1)(d)(2) of the Revised Rules of this Court. Furthermore, in view of the fact that abstention pursuant to the *Younger* doctrine is arguably not applicable to ad-

ministrative proceedings, it cannot be said that the failure of the District Court to abstain on the basis of the doctrine constitutes a "plain error" for purposes of Rule 40 (1)(d)(2) of this Court."

Dealer Appellants also submit that the District Court did not err in refusing to abstain on the basis of the *Pullman* doctrine. The clarity of the establishment protest provisions makes it unlikely that a state court ruling might be delivered which would materially change the nature of the constitutional problem which the District Court felt the Act presented. (*Bellotti v. Baird* (1976) 428 U.S. 132, 147.) In any event, the abstention authorized under the *Pullman* doctrine is equitable in nature, and due to the speculative nature of the possible benefits of abstention to the District Court, that tribunal was well within its discretion to find that *Pullman* abstention was not warranted. (See *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 481 (1977).)

¹⁷See *Ohio Bureau of Employment Services v. Hodory*, *supra*, 431 U.S. at 479-80, where this Court noted the District Court's holding that Younger-Huffman abstention "did not apply to a challenge to administrative proceedings", affirmed the rejection of abstention on other grounds, and stated in footnote 10 that "In view of this conclusion, we need not and do not express any view on whether the District Court erred in refusing to abstain on Younger grounds."

CONCLUSION

For the foregoing reasons, Dealer Appellants submit that the judgment of the District Court should be reversed.

September 20, 1978.

Respectfully submitted,

JAMES R. McCALL

Professor of Law, U. C. Hastings,
Of Counsel

CROW, LYTLE, GILWEE,

DONOGHUE, ADLER &

WENINGER

Attorneys for Appellants.